IN THE SUPREME COURT OF THE STATE OF ALASKA

ROBERT RIDDLE, dba FAIRBANKS PUMPING and THAWING, Appellant, vs. ERIC LANSER, Appellee.	Supreme Court No. S-15780 Trial Court No. 4FA-11-03117 CI

APPEAL FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE BETHANY S. HARBISON

APPELLANT'S BRIEF

WILLIAM R. SATTERBERG, JR.(7610126)
709 Fourth Avenue
Fairbanks, Alaska 99701
(907) 452-4454
Attorney for Appellants

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Alaska Statutes

AS 09.45.230. Action Based on Private Nuisance.

(a) A person may bring a civil action to enjoin or abate a private nuisance. Damages may be awarded in the action.

AS 09.45.235. Agricultural Operations as Private Nuisances.

(a) An agricultural facility or an agricultural operation at an agricultural facility is not and does not become a private nuisance as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations. For purposes of this subsection, the time an agricultural facility began agricultural operations refers to the date on which any type of agricultural operation

began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology. An agricultural facility or an agricultural operation at an agricultural facility is not a private nuisance if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a soil conservation plan developed and implemented in cooperation with the district.

(b) The provisions of (a) of this section do not apply to

(1) liability resulting from improper, illegal, or negligent conduct of agricultural operations; or

(2) flooding caused by the agricultural operation.

(c) The provisions of (a) of this section supersede a municipal ordinance, resolution, or regulation to the contrary.

(d) In this section,

(1) "agricultural facility" means any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment that is used or is intended for use in the commercial production or processing of crops, livestock, or livestock products, or that is used in aquatic farming;

(2) "agricultural operation" means

(A) any agricultural and farming activity such as

(i) the preparation, plowing, cultivation, conserving, and tillage of the soil;

(ii) dairying;

(iii) the operation of greenhouses;

(iv) the production, cultivation, rotation, fertilization, growing, and harvesting of an agricultural, floricultural, apicultural, or horticultural crop or commodity;

(v) the breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock;

(vi) forestry or timber harvesting, manufacturing, or processing operations;

(vii) the application and storage of pesticides, herbicides, animal manure, treated sewage sludge or chemicals, compounds, or substances to crops, or in connection with the production of crops or livestock;
(viii) the manufacturing of feed for poultry or livestock;
(ix) aquatic farming;
(x) the operation of roadside markets; and
(B) any practice conducted on the agricultural facility as an incident to or in conjunction with activities described in (A) of this paragraph, including the application of existing, changed, or new technology, practices, processes, or procedures;
(3) "livestock" means horses, cattle, sheep, bees, goats, swine, poultry, reindeer, elk, bison, musk oxen, and other animals kept for use or profit.

AS 09.45.255. Definitions of Nuisance.

In AS 09.45.230 - 09.45.255, "nuisance" means a substantial and unreasonable interference with the use or enjoyment of real property, including water.

AS 09.60.010. Costs and Attorney Fees Allowed Prevailing Party.

(c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court
(1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right;
(2) may not order a claimant to pay the attorney fees of the opposing party devoted to claims concerning constitutional rights if the claimant as plaintiff, counterclaimant, cross claimant, or third-party plaintiff in the action or appeal did

not prevail in asserting the right, the action or appeal asserting the right was not frivolous, and the claimant did not have sufficient economic incentive to bring the action or appeal regardless of the constitutional claims involved.

AS 09.68.040. Parties Exempt From Giving Bond.

(a) In an action or proceeding in a court in which the state or a municipality is a party or in which the state or a municipality is interested, a bond or undertaking is not required of the state, a municipality, or an officer of the state or municipality.
(b) A bond for costs on appeal need not be filed by a party to an action if a court finds that party to be indigent and the appeal not frivolous; this finding may be made upon an affidavit filed by that party showing that the party is unable to pay for a bond and further stating the grounds for the appeal and the belief that the party is entitled to redress.

AS 22.05.010. Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.
(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

AS 46.40.020. Objectives. (former 2010)

The Alaska coastal management program shall be consistent with the following objectives:
(1) the use, management, restoration, and enhancement of the overall quality of the coastal environment;

the development of industrial or commercial enterprises that are consistent with the social, cultural, historic, economic, and environmental interests of the people of the state;

(3) the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles;

(4) the management of coastal land and water uses in such a manner that, generally, those uses which are economically or physically dependent on a coastal location are given higher priority when compared to uses which do not economically or physically require a coastal location;

(5) the protection and management of significant historic, cultural, natural, and aesthetic values and natural systems or processes within the coastal area;

(6) the prevention of damage to or degradation of land and water reserved for their natural values as a result of inconsistent land or water usages adjacent to that land;

(7) the recognition of the need for a continuing supply of energy to meet the requirements of the state and the contribution of a share of the state's resources to meet national energy needs; and

(8) the full and fair evaluation of all demands on the land and water in the coastal area.

Alaska Rules of Court

Appellate Rule 202. Judgments from Which Appeal May be Taken.

An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010, or from a final decision entered by the Alaska Workers' Compensation Appeals Commission in the circumstances specified in AS 23.30.129.

Civil Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions.

(g) Failure to Cooperate in Discovery or to Participate in the Framing of a Discovery Plan. If a party or a party's attorney engages in unreasonable, groundless, abusive, or obstructionist conduct during the course of discovery or fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the conduct.

Civil Rule 54. Judgments - Costs.

(d)Costs. Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. The procedure for the taxing of costs by the clerk and review of the clerk's action by the court shall be governed by Rule 79.

Civil Rule 56. Summary Judgment.

(f)When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Civil Rule 65. Injunctions.

(a)(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

Civil Rule 79. Costs - Taxation and Review.

(a) Allowance to Prevailing Party. Unless the court otherwise directs, the prevailing party is entitled to recover costs allowable under paragraph (f) that were necessarily incurred in the action. The amount awarded for each item will be the amount specified in this rule or, if no amount is specified, the cost actually incurred by the party to the extent this cost is reasonable.

(b) Cost Bill. To recover costs, the prevailing party must file and serve an itemized and verified cost bill, showing the date costs were incurred, within 10 days after the date shown in the clerk's certificate of distribution on the judgment. Failure of a party to file and serve a cost bill within 10 days, or such additional time as the court may allow, will be construed as a waiver of the party's right to recover costs. The prevailing party must have receipts, invoices, or other supporting documentation for each item claimed. This documentation must be available to other parties for inspection and copying upon request and must be presented to the clerk upon request. Documentation may be filed only if requested by the clerk or in response to an objection.

Civil Rule 82. Attorney's Fees.

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration

of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

Federal Regulations.

40 CFR 503 Appendix B. Processes to Significantly Reduce Pathogens.

1. Aerobic digestion—Sewage sludge is agitated with air or oxygen to maintain aerobic conditions for a specific mean cell residence time at a specific temperature. Values for the mean cell residence time and temperature shall be between 40 days at 20 degrees Celsius and 60 days at 15 degrees Celsius.

2. Air drying—Sewage sludge is dried on sand beds or on paved or unpaved basins. The sewage sludge dries for a minimum of

three months. During two of the three months, the ambient average daily temperature is above zero degrees Celsius.

3. Anaerobic digestion—Sewage sludge is treated in the absence of air for a specific mean cell residence time at a specific temperature. Values for the mean cell residence time and temperature shall be between 15 days at 35 to 55 degrees Celsius and 60 days at 20 degrees Celsius.

4. Composting—Using either the within-vessel, static aerated pile, or windrow composting methods, the temperature of the sewage sludge is raised to 40 degrees Celsius or higher and remains at 40 degrees Celsius or higher for five days. For four hours during the five days, the temperature in the compost pile exceeds 55 degrees Celsius.

5. Lime stabilization—Sufficient lime is added to the sewage sludge to raise the pH of the sewage sludge to 12 after two hours of contact.

B. Processes to Further Reduce Pathogens (PFRP)

1. Composting—Using either the within-vessel composting method or the static aerated pile composting method, the temperature of the sewage sludge is maintained at 55 degrees Celsius or higher for three days.

Using the windrow composting method, the temperature of the sewage sludge is maintained at 55 degrees or higher for 15 days or longer. During the period when the compost is maintained at 55 degrees or higher, there shall be a minimum of five turnings of the windrow.

2. Heat drying—Sewage sludge is dried by direct or indirect contact with hot gases to reduce the moisture content of the sewage sludge to 10 percent or lower. Either the temperature of the sewage sludge particles exceeds 80 degrees Celsius or the wet bulb temperature of the gas in contact with the sewage sludge as the sewage sludge leaves the dryer exceeds 80 degrees Celsius.

3. Heat treatment—Liquid sewage sludge is heated to a temperature of 180 degrees Celsius or higher for 30 minutes.

4. Thermophilic aerobic digestion—Liquid sewage sludge is agitated with air or oxygen to maintain aerobic conditions and the mean cell residence time of the sewage sludge is 10 days at 55 to 60 degrees Celsius.

5. Beta ray irradiation—Sewage sludge is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20 degrees Celsius).

(6) Gamma ray irradiation—Sewage sludge is irradiated with gamma rays from certain isotopes, such as ^{60}Cobalt and ^{137}Cesium, at dosages of at least 1.0 megarad at room temperature (ca. 20 °Celsius).

7. Pasteurization—The temperature of the sewage sludge is maintained at 70 degrees Celsius or higher for 30 minutes or longer.

40 CFR 503.9. General Definitions.

(f) *Domestic septage* is either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

(g) *Domestic sewage* is waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works.

(z) *Treat or treatment of sewage sludge* is the preparation of sewage sludge for final use or disposal. This includes, but is not limited to, thickening, stabilization, and dewatering of sewage sludge. This does not include storage of sewage sludge.

40 CFR 503.32. Pathogens.

(c)Domestic septage. (1) The site restrictions in §503.32(b)(5) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site;

40 CFR 503.33. Vector Attraction Reduction.

(a)(5) One of the vector attraction reduction requirements in §503.33 (b)(9), (b)(10), or (b)(12) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site and one of the vector attraction reduction requirements in §503.33 (b)(9) through (b)(12) shall be met when domestic septage is placed on an active sewage sludge unit.

(b)(10)(i) Sewage sludge applied to the land surface or placed

on an active sewage sludge unit shall be incorporated into the soil within six hours after application to or placement on the land, unless otherwise specified by the permitting authority.

JURISDICTIONAL STATEMENT

A final judgment disposing of all remaining claims was entered in the superior court and was distributed on December 1, 2014. A timely Notice of Appeal was filed on December 23, 2014. This Court has jurisdiction over this appeal pursuant to AS 22.05.010(b) and AR 202.

STATEMENT OF ISSUES PRESENTED

1. The trial court erred in ruling that Robert Riddle's Eielson Farm property was not a farmland and was not entitled to the protections of Alaska's Right to Farm law, AS 09.45.235;

2. The trial court erred in deciding that Robert Riddle created a private nuisance;

3. The trial court erred in enjoining Robert Riddle from creating or maintaining an odor nuisance;

4. The trial court erred in ordering Robert Riddle to apply BioStreme 201 & BioStreme 211 to the septage lagoons; to operate the odor control system as specified by the court; to monitor and keep records of the septage amount dumped into the lagoons; to be available to received odor complaints and to address such complaints; to operate the odor control systems until the lagoons are frozen; to employ Nortec to advise on achieving abatement of the odors and other recommendations; and to keep and maintain records of abatement efforts and of any odor complaints received;

5. The trial court erred in enhancing attorney's fees and costs and in imposing sanctions against Robert Riddle.

STATEMENT OF THE CASE

I. An Introduction and Overview.

An agricultural phenomenon is taking place in America. Since 1935, the U.S. farm population has dwindled while the demand for agricultural products has increased. At the same time, the average age of farmers continues to rise. According to the United States Environmental Protection Agency [EPA], about sixty percent of American farmers are 55 years old or older. The average age of a principal operator of a farm reached 57 years of age in 2007. According to the EPA, "[t]he graying of the farm population has led to concerns about the long-term health of family farms as an American institution."[1]

The aging of the American farmer approaching retirement has resulted in a parceling or subdividing and subsequent selling of farmlands. As nonfarm homes increasingly spring up in the middle of farm country, nuisance suits threaten to put the remaining farms out of business.[2]

In response to the changing demographics and the threat to agricultural production, almost all states have enacted Right to

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[1] "Agriculture: Ag 101: Demographics" U.S. EPA (April 14 2013) online at http://www.epa.gov/agriculture/ag101/demographics.html (last visited June 10, 2015).

[2] *See* Tr.297-98, Vol. II, April 3, 2012, testimony of Peter Fellman, a lifelong farmer who has farmed in Delta Junction since 1987 and who also worked for 12 years as a lobbyist in Juneau for Alaska State Representative John Harris. *Id.* at 288-362; also *see* Tr.2089-94, Vol. X, trial proceedings, testimony

Farm laws. The purpose of such laws is to protect farmers from nuisance suits caused by the encroachment of nonagricultural neighbors moving into traditionally rural areas.[3]

Wisely, the Alaska legislature responded to the nuisance suit trend that threatens Alaska's farms by enacting AS 09.45.235, Agricultural Operations as Private Nuisances, or the Right to Farm Act.

By way of background, beginning in 1962, some 25 years prior to Alaska's Right to Farm Act, state law provided that a person may bring an action for private nuisance.[4] However, the Alaska legislature later added certain prohibitions to bringing private nuisance actions. Undoubtedly because Alaska's farms not only help feed Alaskans and also support other industries in Alaska, the Right to Farm Act was specifically drafted in 1986 to prohibit private nuisance suits against farms.[5] The legislative findings accompanying SB 409, which came to be enacted as AS 09.45.235, are recorded as follows:

> The legislature finds that
>
> (1) agriculture makes an important contribution to the economy of the state;
>
> (2) agricultural land constitutes a unique and irreplaceable resource of statewide significance;

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of Peter Fellman.

[3] *Trickett v. Ochs,* 838 A.2d 66, 73 (VT 2003) (citing 13 Neil E. Harl, Agricultural Law § 124.01, at 124-2 (1993)).

[4] AS 09.45.230, Action Based on Private Nuisance.

[5] AS 09.45.235, Agricultural Operations as Private Nuisances.

(3) the continuation of farming preserves the landscape and the environmental resources of the state;

(4) agricultural land contributes to tourism;

(5) agricultural land furthers the economic self-sufficiency of the people of the state; and

(6) the encouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state.

(b) The legislature further finds that conflicts between agricultural operations and the urban and suburban land uses threaten to force the abandonment of agricultural operations and the conversion of agricultural land to nonagricultural uses and the permanent loss of the agricultural land to the economy and to the human and environments of the state.[6]

The compelling facts of Robert Riddle's case fall squarely within the very purposes for which the Right to Farm Act was enacted. Regrettably, the trial court's ruling effectively overturns the Right to Farm Act, not only with respect to denying Robert the legal protections afforded to farms, but the court's decision also threatens the very existence of Alaska farms everywhere, subjecting farms to indiscriminate private nuisance suits.

II. A Chronology of Events and the Proceedings Below.

Robert Riddle came to Alaska 46 years ago [Tr.760, Vol. IV, April 5, 2012; Tr.2217, Vol. X, trial proceedings]. Since arriving in Alaska, Robert has married, raised children, and

[6] *See* House Resources Committee Minutes, SB 409 - An Act relating to a right to farm, 14th Legislature (February 13, 1986), at http://www.legis.state.ak.us/basis/folio.asp (last visited on

operated a number of commercial enterprises, including Energy Loss Prevention performing dirt work, foam insulating, and septic work [Tr.761, 763, Vol. IV, April 5, 2012; Tr.2218, Vol. X, trial proceedings]. Robert currently operates a motorhome rental business, owns rental properties and, since 1988, owns and operates Fairbanks Pumping & Thawing [FP&T] [Tr.761, 763-64, Vol. IV, April 5, 2012; Tr.2218, Vol. X, trial proceedings]. Robert Riddle d/b/a FP&T does commercial installations of sewage/septage treatment plants, services sewers, septic systems, and water lines, excavates and high-pressure cleans pipes, and also installs and certifies septic systems all over the state [Tr.764, Vol. IV, April 5, 2012; Tr.2219, 2246, Vol. X, trial proceedings]. Robert's children grew up in 4H and the Riddles have owned horses for more than 25 years [Tr.762, Vol. IV, April 5, 2012]. In 1995, Robert served on the sewer sludge committee for the Fairbanks Municipal Utilities System, now Golden Heart Utilities [GHU], in order to assist the utilities company in dealing with odors associated with its sewer treatment plant. [Tr.764, Vol. IV, April 5, 2012].

Robert is also a farmer [Tr.762, Vol. IV, April 5, 2012; Tr.2219, Vol. X, September 12, 2013, Trial Proceedings].

(a) <u>The farming process</u>.

In the mid-1990s, Robert bought 100 acres of land near

June 9, 2015).

North Pole, Alaska, a portion of which he cleared and planted with hay [Tr.2219, Vol. X, trial proceedings]. However, the Corps of Engineers later notified Robert that the property had been designated as Wet Lands and that clearing the land for farming would not be approved [Tr.2219, Vol. X, trial proceedings; Tr.2320, Vol. XI, trial Proceedings].

Subsequently, Robert began searching for farmland to satisfy his desire to farm. Suitable farm property finally became available on Eielson Farm Road.[7] [Tr.2221-24, Vol. X, trial proceedings]. In 2005 Robert obtained 40 acres of the Seabaugh farm and was farming close to 200 acres that same year [Tr.2223, Vol. X, trial proceedings]. Robert then bought more farmland in the area. Robert soon came to own 500 acres of farmland on Eielson Farm Road, all of which properties were then already subject to state Farm Conservation Plans [Farm Plan][Tr.2224, Vol. X, trial proceedings; R.002487; Tr.777, 890. Vol. IV, April 5, 2012; Exc.000001-6].

Even before Robert began developing his farm, he leased farmland on Eielson Farm Road. Robert and Fritz Wozniak began sharecropping that property in 2005 [Tr.766, 775-76, Vol. IV,

[7] The Eielson Farm Road area has been farmed since 1985. The State developed the property specifically as an agricultural project intending that the area would become a small farming community [Tr.703-04, Vol. IV, April 5, 2012]. Eielson Farm Road is approximately 11 miles long and is located 20.7 miles southeast of Fairbanks, Alaska.

April 5, 2012]. That same year, Robert first began developing his Eielson Farm Road property for farming by putting in a road and fencing, and by clearing land [Tr.767, 770 Vol. IV, April 5, 2012]. In time, Robert excavated septage lagoons, put in some wells, moved in tanks, and built a storage facility. Robert's first cutting and harvesting occurred in the fall of 2005 [Tr.770, Vol. IV, April 5, 2012].

At an April 2012 court hearing, Robert testified that he had acquired farming equipment that was being used to farm his acreage on Eielson Farm Road, including four farm tractors, two disks, one four-bottom plow, two tedders, one baler, two rakes, a bale wagon, a mower, a D31 dozer, and a pump truck modified to disburse the biosolids to the fields, as well as other equipment [Tr.771, 773, Vol. IV, April 5, 2012]. In September 2013, Robert testified that he had acquired a Big Gun irrigator, three additional tractors, a grain drill seeder, a manure spreader, dump trucks, loaders and a rototiller. What necessary farming equipment Robert lacked, such as a hydroseeder, he would rent [Tr. 2228-29, 2230, 2233, 2236-37, Vol. X, September 12, 2013, trial proceedings].

Robert keeps horses, cows, and hogs [Tr.762, Vol. IV, April 5, 2012; Tr.2350, Vol. X, trial proceedings]. Robert's farm contains a pasture and his farm has produced sod, potatoes, hay, grain, and oats [Tr.769, Vol. IV, April 5, 2012; Tr.2224-25,

Vol. X, trial proceedings]. Robert testified to the court that he had planted crops every year since owning the farm and that he also had ambitions to start farming peonies and raising reindeer [Tr.2242, Vol. X, trial proceedings; Tr.2459, Vol XI, trial proceedings].

As Robert correctly stated, it takes so long for a farm to grow; it does not happen overnight [Tr.901, Vol. IV, April 5, 2012]. Indeed, farming is a process.

(b) <u>The fertilizing process</u>.

In 2005, Robert began placing the septage he obtained through his septic pumping business into fertilizer lagoons on his farm. While in the lagoons, the septage would continue to undergo the natural process of active bacterial degradation and dewatering through evaporation prior to it being applied as an agricultural soil additive [Tr.362, Vol. II, April 3, 2012; Tr.2246, Vol. X, trial proceedings; Tr.2345, Vol. XI, trial proceedings].

In 2009, Robert first applied septage directly to his fields [Tr.884-86, Vol IV. April 5, 2012]. In the spring of 2010, Bigfoot Pumping & Thawing began contributing its septage to Robert's farm [R.2495]. In June of 2010, Robert began land applying the biosolids from the lagoons to his farm property [R.2496]. In 2011, Robert applied the biosolids to approximately 50 acres of his farmland [Tr.812, Vol. IV, April 5, 2012].

Just as farming is a long and continuous process of developing beneficial soil, cultivating suitable crops, and managing livestock - and it takes decades of work to reach a farm's full production - developing sterile soil into a rich soil base likewise takes many years of adding amendments to the soil [R.000243]. During the case, the court heard testimony from an impressive array of expert witnesses who all confirmed that an accepted farming practice is to apply human waste, as well as other animal waste, to the soil [R.000244].

Unlike the accelerated process employed by sewage treatment plants, which turn sewage[8] e.g. into top soil usable for gardening, the natural and unaided anaerobic treatment process that takes place in a cesspool requires plenty of time [Tr.290-93, 326-27, Vol. II, April 3, 2012]. But, for fertilizing fields, there is actually nothing better than human waste from septic systems [Tr.683, Vol. III, April 4, 2012; Tr.294, Vol.

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[8] Unlike septic systems, sewage treatment facilities use an aerobic system of mixing oxygen with sewage [40 CFR § 503, Appendix B (A)(1); Tr.534-535, 542-547, Vol. III, April 4, 2012].. 40 CFR Part 503 establishes standards for the preparation and land application of sewage sludge. 40 CFR § 503.9, General Definitions, (g) states that domestic "sewage" is "waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works." "Treatment works" is defined as "a device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste in a liquid nature." *See* subsection (z). Domestic "septage," on the other hand, is "either liquid or solid material removed from a septic tank, cesspool," etc. 40 CFR § 503.9(f).

II, April 3, 2012]. Admittedly, from a cultural perspective, the concept of using human waste as fertilizer may seem distasteful to urban-dwelling westerners but, in fact, not only is human waste an excellent fertilizer, but its usage also accomplished the laudable goal of recycling [Tr.371, 376-77, Vol. II, April 3, 2012]. The use of human waste is specifically encouraged and supported by the EPA.[9]

Septage is two percent solids and 98 percent liquids [Tr.375, Vol. II, April 3, 2012]. In 2011, the Alaska Department of Environmental Conservation indicated that, for growing oats, Robert was permitted to spread 41,000 gallons of septage per acre. [Tr.344-50, Vol. II, April 3, 2012]. The process of building up soil by adding the organic matter that septage contains has long-term beneficial effects on the soil [Tr.734-736, Vol. IV, April 5, 2012].

As discussed, *supra,* Robert began transferring septage into his farm lagoons in 2005. Robert's lagoons altogether take up an

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[9] *See* EPA, "Domestic Septage Regulatory Guidance," September 1993, p. 10, EPA 832-B-92-005, available Online at: http://nepis.epa.gov/Exe/ZyNET.exe/200041HP.TXT?ZyActionD=ZyDocument&Client=EPA&Index=1991+Thru+1994&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C91thru94%5CTxt%5C00000003%5C200041HP.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7Cf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL (last visited July 30, 2015)

area of approximately two acres of his 500-acre farm [Tr.356, Vol. II, April 3, 2012; Tr.2226, Vol. X, trial proceedings]. In 2010, Robert began accepting septage from Bigfoot Pumping & Thawing [R.002495].

It should be noted that the harvesting of crops is regulated when domestic septage is directly applied to already established crops.[10] Also, regulations specify that animals are not to graze in fields until 30 days following the application of septage.[11] Therefore, having in mind the applicable EPA Part 503 regulations regarding land application of biosolids,[12] in 2010 Robert had some unplanted acreage prepared to accept the application of biosolids, and he had by then acquired enough septage to begin regularly applying the biosolids to his farmland [Tr.775, 821-22, 862-63, Vol. IV, April 5, 2012].

(c) <u>The permitting process</u>.

Just as farming is a process and the anaerobic treatment of septage is a process, obtaining the required permitting to farm and to land apply biosolids is also a process, as discussed, *infra*.

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[10] 40 CFR § 503.32(c)(1).
[11] 40 CFR § 503.32(c)(1).
[12] "The EPA has a policy that encourages the beneficial use of sewage sludge, including domestic septage." *See* "Domestic Septage Regulatory Guidance: A Guide to EPA 503 Rule," United States Environmental Protection Agency, EPA 832-B-92-005 September 1993, p. 10. Online at: http://nepis.epa.gov/Exe/ZyPDF.cgi/200041HP.PDF?Dockey=200041HP.

As previously discussed, Robert purchased farmland that was already subject to Farm Plans since 1985 [R.002487; Tr.777, 890. Vol. IV, April 5, 2012; Exc.000001-6]. The Alaska Department of Natural Resources, Division of Agriculture, reviews Farm Plans for compliance with local soil and water conservation districts and with agricultural covenants [Tr.702-03, Vol. IV, April 5, 2012]. The Division approves Farm Plans and also allows updates to the Farm Plans, as it becomes necessary [Tr.703, Vol. IV, April 5, 2012]. A Farm Plan runs with the land [Tr.703, Vol. IV, April 5, 2012]. In time, Robert properly filed a new Farm Plan due to the expansion of his operations on his farm [Tr.701-03, Vol. IV, April 5, 2012; Exc.000020-43].

During the year 2005, Robert traveled several times to Seattle and dealt directly with Dick Hetherington in order to secure permitting from the EPA for the beneficial application of septage [Tr.783, Vol. IV, April 5, 2012]. In 2007, Robert applied to the Alaska Department of Environmental Conservation [DEC] for a permit to apply domestic septage to his Eielson Farm Road land to be used to grow turf and feed crops [Tr.767, 784, Vol. IV, April 5, 2012]. Robert's DEC permit was issued in April 2007 [Tr.804, Vol. IV, April 5, 2012; R.000374; R.000186; Exc.000007-10].

When Robert was obtaining the EPA and DEC permitting, he

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was then unaware of the need to obtain a Fairbanks North Star Borough [FNSB] permit, as well [Tr.783, Vol. IV, April 5, 2012]. Subsequent to learning about the FNSB permitting, Robert applied for FNSB approval to apply biosolids to his farmland [Tr.785, Vol. IV, April 5, 2012]. After holding a public hearing, the FNSB in its letter dated September 19, 2007, notified Robert that the FNSB had approved his beneficial application of biosolids to his Eielson Farm Road farmstead [Tr.791-92, Vol. IV, April 5, 2012; R.000587-88; Exc.000018-19].

The permitting process, which Robert had begun in 2005, was completed in 2007 [R.000374; R.000587]. Thereafter, during all times relevant to the underlying lawsuit, Robert remained in substantial compliance with his permitted uses and his permits were not revoked by any of the involved agencies [Tr.829-30, Vol. IV, April 5, 2012; Tr.2453, Vol. XI, trial proceedings].

(d) Enter: the subdivision developer, Eric Lanser.

In 2007, Eric Lanser, a builder and speculative developer, bought land on Eielson Farm Road [Tr.466, 469, Vol. II, April 3, 2012]. Lanser soon rezoned the property to Rural Farm 4, permitting him to subdivide the property into residential lots of slightly less than four acres each [Tr.469-71, Vol. II, April 3, 2012]. Lanser's intent was to market "farmettes" [Tr.596, Vol. III, April 4, 2012]. Subsequent to the rezoning, Lanser completed the subdividing process [Tr.473, Vol. II, April 3,

2012]. In 2007, Lanser refurbished the house on Lot 8 of Arctic Fox Estates and rented it to tenants [Tr.475, Vol. II, April 3, 2012; Tr.551, 554, 556, Vol. III, April 4, 2012]. In 2008, Lanser began building the first new residences in Arctic Fox Estates. [Tr.562, Vol. III, April 4, 2012].

In the fall of 2007, the FNSB held a hearing on Robert's application for a conditional use permit [Tr.556-57, Vol. III, April 4, 2012]. Lanser attended the hearing and commented publicly of his concerns for "smelly things," e.g. manure and sewage, notwithstanding the fact that Lanser had knowingly purchased property on the Eielson Farm Road [Tr.557, Vol. III, April 4, 2012]. In 2008, Lanser built two new residential dwellings on Lot 3 and Lot 7, which were sold in 2009 to Lawson and to Slongwhite and Long [Tr.562, Vol. III, April 4, 2012]. In 2010, Brunsberg bought a house Lanser built on Lot 2. [Tr.478-79, 481-83, Vol. II, April 3, 2012].

Lanser testified that he first smelled odors from Robert's farm in May 2010, when he was working on the roof of the Brunsberg house at Lot 2 [Tr.476-79, 482, Vol. II, April 3, 2012]. Lanser called Robert the following day to report odors in order "to give him a chance to fix it." [Tr,566-67, Vol. III, April 4, 2012]. When, in the summer of 2010, Lanser again smelled odors from Robert's farming operation, Lanser contacted the FNSB and was advised that the FNSB would take no action but

would defer to the DEC for handling complaints [Tr.567-69, Vol. III, April 4, 2012]. Lanser began communicating with and e-mailing the DEC in the summer of 2010 [Tr.572-73, Vol. III, April 4, 2012].

Kenneth Spiers with the DEC solid waste division received Lanser's first complaint in July 2010, followed by complaints from residential households in and near the Arctic Fox Estates subdivision, including Brunsberg, Thompson, Paden, and Lawson, who complained mainly of odors and the frequent traffic of pumping and thawing trucks [Tr.34-49, 50-51, 53, 60, Vol. I, April 2, 2012]. In order to verify the odor complaints received during 2010 and 2011, Spiers and/or Smyth of the DEC went out to Eielson Farm Road 10 or 11 times, but were able to verify intermittent septage odors one time only [Tr.67-8, 92, 106-07, 108, 113-14, Vol. I, April 2, 2012]. Meanwhile, Smyth and his supervisor with the DEC, James McGinnis, had determined that the lagoons holding septage were impermeable [Tr.1364 Vol. VI, trial proceedings]. As such, the lagoons, therefore, did not represent a public health danger [Tr.1364, Vol. VI, trial proceedings]. According to DEC's James McGinnis, Robert was not required to obtain any wastewater permit [Tr.1377, Vol. VI, trial proceedings; Tr.2151, Vol. X, trial proceedings].

In spite of occasionally noting the intermittent odors in 2010, Lanser continued to develop the Second Addition and the

Third Addition to Arctic Fox Estates - totaling 22 lots in all[13] - and he continued to build and sell residences there [Tr.482, 493, 496, Vol. II, April 3, 2012]. Of note is that Lanser apparently did not disclose to his buyers the concerns that he had with odors [Tr.1157-58, Vol. V, trial proceedings].

On December 20, 2011, Lanser filed suit against Robert and the DEC [R.2983].

(e) The proceedings below.

Lanser's Complaint for Injunctive and Declaratory Relief alleged both private the public nuisance. The Complaint alleged that Robert's negligence resulted in odors emanating from Robert's property, causing Lanser to suffer irreparable injury to property values, use and quiet enjoyment of property, human health and safety, livelihood, and general enjoyment of life. Lanser demanded an injunction to stop the delivery of "raw sewage" and to require the DEC to revoke Robert's permit and, furthermore, to require the DEC to work with the FNSB to also revoke its permit. The Complaint requested a declaration requiring Robert to implement an odor control plan, alleging that the general public will suffer irreparable harm to property values, the use and quiet enjoyment of property, human health and safety, livelihood, and the general enjoyment of life. The

[13] *See* Document 2013-000175-0, Fairbanks Recording District, Fairbanks Plat 2013-3, Arctic Fox Subdivision Third Addition.

Complaint also alleged DEC negligently breached its duty to investigate and enforce its policies [R.2983-3000].

(1) Preliminary Injunction. An extensive four-day preliminary Injunctive Hearing was held April 2 through April 5, 2012, before Judge Olsen. Ken Spiers, environmental protection specialist with the DEC Division of Solid Waste, testified that the DEC had received some complaints from people residing in the area of Robert's property, but had difficulty verifying the complaints [Tr.31-32, 67, Vol. I, April 2, 2012]. Although Robert actually tried to generate septage odors for the DEC, the DEC was only able to verify septage odors offsite on one occasion out of 10 or 11 site visits [Tr.56, 67-8, Vol 1, April 2, 2012]. Bill Smyth, DEC, testified that he was with Ken Spiers on the day that the DEC was finally able to identify the intermittent septage odors [Tr.105, 110-11, 113, Vol. I, April 2, 2012]. Smyth also noted that most of the calls received by DEC came mainly from two individuals, namely, Lanser and Brunsberg [Tr.102-114, Vol. I, April 2, 2012].

From the contrasting testimony, infra, it is apparent that whether a farm odor is deemed to be objectionable is highly subjective and depends largely upon a person's past exposure to farm smells. For example, people who resided in the neighborhood testified to noticing septage odors as follows:

Brunsberg stated the odors were at times like a Porta-Potty, varying from very brief to unbearable [Tr.123, 125, Vol. 1, April 2, 2012]. Brunsberg also used the word "horrible." [Tr.123, Vol. 1, April 2, 2012]. Brunsberg stated that he was familiar with farm smells but that he did not think that septage was an "acceptable odor from farming operations." [Tr. 129, Vol I, April 2, 2012]. Renson also testified to detecting the odor of a "Porta-Potty" about two to three times a week [Tr.181-82, Vol. 1, April 2, 2012]. Renson made a distinction between his idea of a "farm smell" and that of a "Porta-Potty" [Tr.182, Vol. 1, April 2, 2012]. Holland testified of his concern that the septage might permeate the water table [Tr.220-21, Vol. I, April 2, 2012]. Notably, Holland acknowledged that human septage has long been used for fertilizer and he did not recall smelling any odor from Robert's farm [Tr.211, 223, Vol. I, April 2, 2012]. Sutton testified that he smelled "open sewer," which he described as kind of bothersome [Tr.239, 241, Vol. II, April 3, 2012]. Sutton apparently did not equate septage with farm smells, stating, "I mean, I can understand some kind of farm smell. I mean, that's not too bad, but what I smell, I -- I wouldn't want it for a long run around my house." [Tr. 243, 245-46, 251, Vol. II, April 3, 2012]. Lawson testified that he brings in compost and has no objection to its smell [Tr.255, Vol. II, April 3, 2012]. Lawson testified that he has spent time

around farm animals but that the smell from Robert's farm is uncomfortable, unpleasant, and nauseous [Tr.258-59, Vol. II, April 3, 2012]. Lawson testified that he expects that farms have a "farm smell," but that smelling septage is upsetting to him [Tr.277, Vol. II, April 3, 2012].

Lanser, the plaintiff in the proceedings below, testified that he did not think it was unreasonable to say, "I don't want any odors; I don't want any smells on my property" even though he may be in the center of farm country [Tr.591, Vol. III, April 4, 2012].

In contrast with the new residential inhabitants to the area, Peter Fellman, who has been around farming all his life - including fertilizer lagoons - and has actively farmed in Delta since 1987, testified:

> When I spread manure, you can smell it four miles away. You know, I mean, if the wind is blowing in Delta, believe me, you know, you can make -- make a stink. Everybody accepts that down where we're at because it's -- it's part of agriculture. I go out -- when I pump my personal septic tank, I take it out and I spread it, and yeah, it smell -- it smells for a while, you know, but it also turns into a crop that I can feed my family with. [Tr.305, Vol. II, April 3, 2012].

Likewise, Bernie Karl has spent his entire life around farming [Tr.365, Vol. II, April 3, 2012]. Currently, Karl has a farming operation at Chena Hot Springs Resort, which he owns and operates [Tr.366, Vol. II, April 3, 2012]. Karl maintains a permitted septage pit and applies septage to his hay fields

[Tr.370-71, Vol. II, April 3, 2012]. Regarding the smell, Karl states that it smells when the septage is sprayed on the fields but nature takes care of it and the nutrients go into the soil [Tr.422, Vol. II, April 3, 2012]. Karl testified that he personally prefers the smell of a sewage pit to that of hogs [Tr.403, Vol. II, April 3, 2012]. Karl correctly stated that farms have to deal with waste [Tr.420, Vol. II, April 3, 2012]. And, regarding the smells associated with human fertilizer, Karl states that we must choose farming over people's personal preferences because "agriculture is so important." [Tr.418, Vol. II, April 3, 2012].

Bryce Wrigley has a farm in Delta [Tr.425, Vol. II, April 3, 2012]. Wrigley is familiar with open pit lagoons being a part of farming [Tr.426-27, Vol. II, April 3, 2012]. Wrigley frankly stated that farms have always stunk but that the battle between urban dwellers and farms has developed in recent generations because there has been a dramatic shift away from farms and rural communities and, therefore, people have become disconnected with farming and have lost an understanding of from where their food comes [Tr.439-42, Vol. II, April 3, 2012]. Wrigley testified that, if farms were prevented from being smelly, then he did not know anyone who could stay in farming [Tr.441, Vol. II, April 3, 2012].

Francis Wozniak was raised on a farm and is currently in charge of farming operations for Huffman Farms, also on Eielson Farm Road [Tr.664-65, 678, Vol. III, April 4, 2012]. Wozniak has sharecropped with Robert for years [Tr.665, Vol. III, April 4, 2012]. Wozniak testified that Robert has been spreading septage on the fields with good results [Tr.667, Vol. III, April 4, 2012]. Regarding the smells associated with Robert's septage lagoons, Wozniak testified that he had spent quite a bit of time at Robert's farm and further testified:

> I don't smell -- I haven't -- in all the time I've been out on the farms and tilling Robert's land, I can honestly say that unless I was standing next to the lagoons I didn't have any -- you know, you didn't tell that they were there unless you were right on top of them. [Tr.679, Vol. III, April 4, 2012].

Robert also called an Alaska state employee, Daniel Proulx, as a witness. Proulx works with the State Division of Agriculture in the Department of Natural Resources and testified to the Farm Plan history of Robert's land [Tr.701-03, Vol. IV, April 5, 2012]. Proulx testified that he was at Robert's farm for about four or five hours in 2011. Proulx testified that he did not smell anything even though he was near the lagoons and had walked Robert's fields [Tr.706-09, Vol. IV, April 5, 2012].

Robert's expert, Dr. Charley Knight, is retired from the State Division of Agriculture and he also owns a 31-acre farm [Tr.712, 720, Vol. IV, April 5, 2012]. Dr. Knight has visited

Robert's farm on Eielson Farm Road at least once a week, and often three times a week, every summer since Robert began farming operations there. [Tr.720, 737-38, Vol IV, April 5, 2012]. Dr. Knight testified that he never noticed pervasive odors, but that the only time he ever really noticed any odors was in the fall of 2011 when Dr. Knight was working on some equipment. "I ended up spending about two hours about 30 yards from the lagoons, and I smelled it, but they had two bulldozers out there and they were agitating the lagoons. And I could smell it there." [Tr.737, Vol. IV, April 5, 2012].

Following four days of testimony, Judge Olsen noted the wide disparity regarding the strength and the frequency of the odors. Although Lanser asserted, "This is not a farm; this is a septage dump," Judge Olsen disagreed and found Robert "to be operating a legitimate farm" [Tr.636, Vol. III, April 4, 2012; Tr.929, 932, Vol. IV, April 5, 2012].

The May 22, 2012, Order Denying Plaintiff's Motion for Preliminary Injunction and Order Denying Defendant Riddle's Motion to Dismiss for Failure to State a Claim [Injunction Order] declined to issue a preliminary injunction because (1) the smells were fleeting and would not cause irreparable harm to Lanser; and (2) a probable outcome in Lanser's favor was not clear [R.000247].

At the outset, Judge Olsen took note of the Harvard Journal of Law where it recognized the property use problems that arise when suburbanites locate in farmlands, giving rise to agricultural nuisance suits:

> Occasionally, when a court orders that a farm operation be permitted to continue, it will order that the farmer compensate the neighboring property owner in monetary damages for the injury inflicted by the farming operation. This remedy, like that of the equitable injunction, may put a farm out of business, and when farmers are put out of business and replaced by nonfarming property owners or entrepreneurs, productive farmland is lost to nonagricultural uses. *This compounds the underlying problem*. (emphasis added).[14]

Judge Olsen analyzed Alaska's Right to Farm Law, correctly noting that AS 09.45.235 has no fixed period of time that the farm must be in existence prior to receiving the benefit of the statutory protection. Also, AS 09.45.235 expansively provides that "the time an agricultural facility began agricultural operations refers to the date on which *any type of agricultural operation began on that site* . . ." Importantly, Judge Olsen factually found that, "[i]n this case, grains from fertilized fields, including bio-solid fertilizers, were being raised well before [Lanser's] subdivision was created." [R.000248-249].

The Injunction Order disposed of Lanser's mistaken contention that Robert's operation was not really agricultural but was merely a means to avoid paying septage dumping fees to

[14] *See* R.000248, n.8, citing 9 *Harv. J.L. & Pub. Pol'y* 481, 485.

GHU. The Injunction Order stated that Lanser's argument only works if there is no valid farming purpose to the application of the septage. Contrary to Lanser's argument, the court found that "farmers who reviewed [Robert's] operation classified his farm as a legitimate farm." [R.000249-251]. The court also found that the "storage and application of human waste to grain fields is an accepted farming practice," which falls squarely under the protective ambit of AS 09.45.235. [R.000250].

The Injunctive Order also disposed of Lanser's argument that the protections of AS 09.45.235 are unavailable to Robert because Robert apparently failed to create or maintain complete records of the septage application. Judge Olsen held, "While these allegations are potentially serious, they do not overcome the protection of the Right-to-Farm statute. Even if these [failures] were remedied, they would do nothing to reduce the odor produced by the septage lagoons." [R.000254].

(2) State of Alaska dismissed. On March 14, 2012, the State filed its motion to dismiss the DEC from the suit. [R.000113]. At the June 1, 2012, Oral Argument on the Motion to Dismiss, Judge Olsen dismissed the State from the action [R.000411].

(3) Reassignment of judges and motions for summary judgment. On September 20, 2012, Robert filed a motion for summary judgment re: Lanser's private nuisance claim, Lanser's

public nuisance claim, and Lanser's negligence claim [R.000328-337].

Soon thereafter, the case was administratively reassigned to Judge Harbison on October 31, 2012, due to Judge Olsen's retirement.

Lanser opposed and cross-moved for summary judgment on those same issues on March 1, 2013 [R.001392-001430]. Robert's Combined Opposition and Reply was filed April 1, 2013 [R.001639-001715]. Oral Argument took place before Judge Harbison on June 10, 2013.

At the Oral Argument, Judge Harbison first evidenced a mistaken view of the Right to Farm law, i.e. that Robert's farm must be in use "primarily" as a farm in order for the private nuisance protections of AS 09.45.235 to apply. Counsel reminded the court that Judge Olsen had previously ruled that Robert was operating a legitimate farm. Judge Harbison remarked, "But isn't this a factual question, really? I mean, is it -- is he primarily farming? Or has he primarily now turned it into some kind of septic treatment holding?" [Tr.8-9, Oral Argument June 10, 2013]. Robert's counsel then reminded the court that, although the FNSB permit contained a "principal use" clause, the Alaska Statutes specifically protected commercially related agricultural activities from private nuisance suits [Tr.16-18, Oral Argument June 10, 2013].

In spite of the attempted clarification, Judge Harbison issued an order on the summary judgment motions on July 1, 2013, [hereinafter "SJ Order"] which applied an incorrect legal distinction. The SJ Order factually found that Robert began a farming enterprise in 2005, that Robert "is engaged in farming," and that he used septage from his pumping and thawing business to fertilize his farm. However, the SJ Order also stated that whether the "principal" use of the property is agriculture or whether the "principal" use of the property is the disposal of biosolids is a contested issue of fact. [R.002301-02, 002305, 002308]. And, this is where the problem developed.

Judge Harbison narrowly and incorrectly construed the broadly-written Right to Farm Act to also require that the agricultural facility or the agricultural operation be not only intended for commercial production or processing of agriculture, but that the agricultural purpose must also be a primary purpose in order for AS 09.45.235 to apply:

> This court finds that the "Right-to-Farm Act" bars Lanser's private nuisance claim only if [Robert's] land is an "agricultural facility." As long as [Robert] Riddle's use or intended use of his land is "the commercial production or processing of crops, livestock, or livestock products," Lanser's private nuisance claim is barred. If, however, Riddle no longer uses or intends to use his land primarily for these purposes and instead primarily uses his land for the disposal of biosolids, the "Right-to-Farm Act" does not bar Lanser's private nuisance claim. As indicated above, whether the principal use of the property is agricultural in nature, with the beneficial application of biosolids remaining an accessory use in support of agriculture use,

> or whether the primary use of the property is the disposal of biosolids is a contested issue of fact. (emphasis added) [R.002310].

It is clear that the court unilaterally constructed a "primary use" element and inserted it into its analysis, even though no such requirement exists in the statutes. Then, instead of summarily dismissing Lanser's private nuisance claim pursuant to AS 09.45.235 on the basis that Robert's land is an agricultural facility - which the court clearly acknowledged it was at R.002301-02 and R.002305 - the trial court erroneously denied summary judgment in Robert's favor [R.002308, 002310, 002318].[15]

As to the other allegations, the SJ Order summarily dismissed Lanser's public nuisance and negligence claims [R.002318].

(4) The 11-Day Trial. On July 9, 2013, the judge-held trial went forward on Lanser's private nuisance claim. In many respects, the trial testimony largely was a replay of the

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[15] Robert's July 8, 2013, Motion to Reconsider, in Part, Court's Order Dated July 1, 2013 and Memorandum in Support Thereof, brought the error to the court's attention a second time. [R.002215]. On the first day of trial, July 9, 2013, Judge Harbison orally denied Robert's Motion to Reconsider, stating that the statute does not indicate what happens when a land is used for different purposes. The trial court concluded that the "intention of the statute was to continue to protect farms as long as they're still primarily farms." [R.13-16, Vol.I, trial proceedings]. Four months later, Judge Harbison acknowledged her prior error of the trial court's "primary purpose" analysis in the Order dated November 7, 2013, at footnote 14 [R.002501].

Preliminary Injunction Hearing of April 2012, held before Judge Olsen.

Although the court had previously disposed of Lanser's public nuisance claim, nevertheless, five people who reside in or around Lanser's subdivision were permitted to again testify to smelling odors. Some of these witnesses also expressed the view that using septage, in their own personal, lay opinion, is not a farm related activity. Presumably the "odor" testimony was admissible for the purpose of corroborating Lanser's odor testimony. Interestingly, the same residents also testified to observing Robert's farming activities, farm equipment, and livestock. For example, Dean Lawson testified to living in the neighborhood and occasionally noting smells, but he also noted farming activity on Robert's property including livestock, farm equipment in operation, soil being tilled, and observing what Lawson recognized as Robert growing commercial turf [Tr.77-78, 80-86, 95-6, 99, 106 Vol. I, trial proceedings]. Mark Renson testified to seeing a farm tractor, farming equipment, and cows on Robert's property [Tr.169, 203-04, Vol. I, trial proceedings]. Diane Long testified to observing livestock and a pen, equipment and a field being mowed [Tr. 231, 234, 236, Vol. I. trial proceedings]. John Brunsberg also testified to observing livestock, soil being tilled, and tractors plowing [Tr.291-92, 361-62, Vol. II, trial proceedings]. Ron

Illingsworth testified to observing fences, livestock, the application of septage, tilling, crops, tractors, and a pasture [Tr.750, 764-69, Vol. IV; Tr.1058-69, Vol. V, trial proceedings]. Stuart Davies testified to seeing fencing, cultivated fields, livestock, and hay on Robert's land. Davies also testified that he had a serious interest in obtaining septage to build up his own soil but that he lacked any means of storing septage [Tr.925-8, 958-59, 968, 977-78, 985-86, Vol. V, trial proceedings].

As to Lanser's claim of suffering a private nuisance, Lanser testified to first smelling septage odors in May 2010 while he was building a home in his subdivision [Tr.1033-34, Vol. V, trial proceedings]. Lanser contacted Robert to "fix it." [Tr.1035-36, Vol. V, trial proceedings]. However, when Lanser once again noted a septage smell, he contacted the FNSB permitting and then the DEC permitting [Tr.1037-38, Vol. V, trial proceedings]. Lanser testified extensively to his frustration that neither Robert nor the involved agencies "were doing anything about" his complaints [Tr.1037-40, 1085-89, 1101-04, 1107, 1115-18, 1145-53, Vol. V, trial proceedings]. Lanser testified that he was at his subdivision five days a week between 7:30 a.m. and 5:00 p.m. and that he intermittently detected odors - two times a week on the average - during the warm season [Tr.1026, 1037-38, Vol. V, trial proceedings]. In

Lanser's view, there should not be any odors that affect the neighboring land or the neighbors [Tr.1120, Vol. V, trial proceedings].

Nowhere did Lanser ever testify that the smells interrupted or prevented his work activities. To the contrary, Lanser did not testify that his eyes watered or burned or that he had to take a break from his house building project because of a bad smell. Lanser never indicated that he could not breathe properly due to the odors or that any of his employees were unable to function on the jobsite.

To summarize Lanser's testimony in support of his private nuisance claim, Lanser testified more extensively to his frustration in dealing with the FNSB and the DEC and seemingly getting nowhere than he did to any impact the odors allegedly had upon him personally [Tr.1037-40, 1085-89, 1101-04, 1107, 1115-18, 1145-53, Vol. V, trial proceedings]. Lanser's limited testimony to his private nuisance claim was that, in his view, there should not be any odors whatsoever [Tr.1120, Vol. V, trial proceedings].

In favor of Robert's Right to Farm defense, Bernie Karl testified to having visited Robert's farm and observing hay, potatoes and sod being grown there, as well as Robert's substantial farming equipment and the presence of livestock [Tr.414-15, 419, 423-26, 437-8, 441, Vol. II, trial

proceedings]. Karl stated that Robert's farm is not a sham or a dump [Tr.464, Vol. II, trial proceedings]. Rather, to Karl, a lifelong farmer, Robert's land looked like a farm with fields planted [Tr.429, Vol. II, trial proceedings].

Ron Illingsworth, an Eielson Farm Road farmer, testified to observing livestock in 2010, 2011, 2012, and 2013, as well as septage application, tilling, and planting, on Robert's farmland [Tr.765, 769-70, Vol. IV; Tr.1042-43, 1058-68, Vol. V, trial proceedings].

Bryce Wrigley, likewise a lifelong farmer and whose ancestors were also farmers, testified to observing farming equipment, livestock, pasture, and planted fields at Robert's farm [Tr. 785-91, 93, 806-09, 811-12, Vol. IV, trial proceedings]. Wrigley testified that he could only smell Roberts lagoons a little bit as they approached the area, stating that it was neither horrendous or overwhelming, rather, "I guess, coming from a farming background, I understand smells. And having raised hogs especially, this was not as bad as it was in our barn [Tr.816-17, Vol. IV, trial proceedings]. In Wrigley's experience, the septage lagoons at Robert's farm were "rather small" [Tr.831-35, Vol. IV, trial proceedings].

A former state DEC employee, James McGinnis testified at trial on July 16, 2013. McGinnis had recently retired as supervisor of the DEC's Water Division and had spent 20 years of

his employment dealing with wastewater [Tr.1311, 1320-21, Vol. VI, trial proceedings]. McGinnis testified that, in 2011, Bill Smyth with the DEC Wastewater Division in Fairbanks contacted him regarding Robert's farm operation [Tr.1324, Vol. VI, trial proceedings]. There had been complaints of odors, and Robert's lagoons lacked advance approval from the Wastewater Division of DEC [Tr.1326, Vol. VI, trial proceedings].

According to McGinnis, about one-third of wastewater construction in Alaska occurs without DEC's prior approval. In the overall scheme of things, such is not particularly concerning to the DEC [Tr.1326, Vol. VI, trial proceedings]. However, in April 2011, McGinnis accompanied Smyth and Spiers on the site visit to Robert's property. McGinnis testified that he noticed no odors from the lagoons at that time [Tr.1327, Vol. VI, trial proceedings]. McGinnis testified to seeing rolls of hay and farming equipment, as well as fields significantly under cultivation, and provided photographs that McGinnis had taken, [Tr.1331, 1342, 1346-47, 1353-54, Vol. VI, trial proceedings].

McGinnis testified that he also visited Robert's farm in September 2011 and that he confirmed that Robert's operation was a farm [Tr.1331, 1342, 1346-47, 1353-54, Vol. VI, trial proceedings]. McGinnis described the lagoon odors in September as being an "earthy, musky smell" - not repulsive [Tr.1357, Vol. VI, trial proceedings]. McGinnis stated that, as a policy

matter, the DEC was interested in compliance, not punishment. DEC enforcement activities were designed to bring people into compliance, not fine them or put them out of business [Tr.1408, Vol. VI, trialcG proceedings]. Minnis also testified to the fact that Robert complied with all DEC's recommendations, including decommissioning some of the lagoons proximate to a slough, and that Robert remained in compliance with DEC requirements thereafter [Tr.1338-39, Vol. VI, trial proceedings]. McGinnis stated that a reason for making the site visit was to determine whether the lagoons were supporting a farming operation, which he stated it was apparent that they were [Tr.1414-15, Vol. VI, trial proceedings].

With respect to the complaints of odors, McGinnis testified that the DEC works for all the public and that the department has an informal policy of assisting people to get along, if possible [Tr.1359, Vol. VI, trial proceedings]. For example, the DEC recommended Robert apply lime to the lagoons for odor control, which Robert did but which was apparently ineffective [Tr.1403-04, Vol. VI, trial proceedings]. In the Riddle/Lanser matter, McGinnis eventually determined that the Department's efforts to reach a resolution to the odors were unfruitful. "And since the odors did not appear to have a regulatory basis in 18 AAC 72 directly, I verbally directed, and followed up with an email to Bill Smyth, to stop working on the odor issues."

[Tr.1360-61, Vol. VI, trial proceedings]. The DEC's regulatory concern with respect to wastewater is to protect the public health, and Robert's lagoons were in compliance with DEC's wastewater requirements in that regard, according to McGinnis [Tr.1361, Vol. VI, trial proceedings].

Daniel Proulx testified again at the trial on July 17, 2013. Proulx, who works for DNR's Agriculture Division, testified to the process and purposes of Farm Plans [Tr.1421, Vol. VII, trial proceedings]. Proulx testified that he investigated odors, walked through an oat field about 10 feet from the lagoons, and could smell nothing [Tr.1462-63, Vol. VII, trial proceedings]. Proulx also stated that Robert's lagoons appeared on his state-approved Farm Plan [Tr.1466, Vol. VII, trial proceedings]. Proulx also stated that the Division of Agriculture never found Robert to be out of compliance with the Farm Plan, which Plan included lagoons and the spreading of septage [Tr.1466, Vol. VII, trial proceedings].

Robert's defense expert, Dr. Charles Knight, a farm boy who grew up and acquired his B.A. and M.A. in Agronomy and his Ph.D. in soil chemistry, also testified again at the trial on July 17, 2013 [Tr.1598, Vol. VII, trial proceedings]. Dr. Knight is also a farmer with 30 years' experience in Alaska doing research with planting crops [Tr.1735, Vol. VIII, trial proceedings]. Dr. Knight testified that he worked with Robert to develop the rate

of application of septage to meet the solid waste permitting requirements [Tr.1611, Vol. VIII, trial proceedings]. Dr. Knight also advised Robert on developing a state Farm Plan, and explained to the court that the purpose of a Farm Plan is to protect the farm in perpetuity for agricultural use [Tr.1613-1615, Vol. VII; Tr. 1750, Vol. VIII, trial proceedings]. Dr. Knight also explained that the Right to Farm Act protects farms with a Farm Plan from being sued as a private nuisance [Tr.1615, Vol. VII, trial proceedings]. Dr. Knight also testified that the price of hay is usually $300 per ton [Tr.1623, Vol. VII, trial proceedings]. Importantly, Dr. Knight testified to observing Robert as he developed his farm, including acquiring land and machinery, stating that Robert's farm has developed into one of the nicer farms in the area, producing several thousands of dollars in crops [Tr.1627-32, Vol. VII, trial proceedings]. Regarding soil chemistry, Dr. Knight calculated that it would take Robert 200 years of solid waste application before he would reach the maximum allowable saturation of heavy metals [Tr.1668-69, Vol. VIII, trial proceedings]. Dr. Knight also testified that Robert is operating a farm, and that lagoons are a part of Robert's farming activity but that Robert does not have near enough biosolids to meet the needs of his crops [Tr.1682-83, 1745, Vol. VIII, trial proceedings].

On July 19, 2013, Ken Spiers, then a retired program

specialist of the DEC solid waste division, testified that he oversaw for the DEC all the biosolids land-spreading operations in the Interior [Tr.1888-90, Vol. IX, trial proceedings]. At the time that Robert applied for DEC permitting to spread biosolids, the DEC incorrectly required that the applicant include an odor control plan [Tr.1893-94, Vol. IX, trial proceedings]. DEC issued Robert's permit in April 2007 [R.000374; Exc.000007-17]. Spiers also testified that, in time and after Robert's permit had already been issued, the DEC became aware of the Right to Farm Act and the DEC's legal right to enforce odor control then came into doubt [Tr.1895, Vol. IX, trial proceedings]. Spiers testified that he attempted 10 to 12 times to investigate after he received odor complaints concerning Robert's farm beginning in the spring of 2010 [Tr.1898-99, Vol. IX, trial proceedings]. Spiers testified that he detected odors when he came near to Robert's lagoons, but only one time was he able to identify odors coming from the lagoons in May 2011 when he was off of Robert's property [Tr.1901, Vol. IX, trial proceedings]. Following the verification of an offsite odor, Spiers recommended Robert try applying lime for odor control. To Spiers' knowledge, Robert complied with that suggestion [Tr.1903-04, Vol. IX, trial proceedings]. Inasmuch as the odors were considered to be coming from the lagoons rather than the land-spreading of biosolids, DEC made a policy decision that any

odor was not a matter of concern for the solid waste division [Tr.1905-06, Vol. IX, trial proceedings]. Spiers also testified that, although DEC had detected no operational deficiencies, initially Robert was not in full administrative compliance with the DEC's solid waste reporting requirement [Tr.1909-10, 1913-14, Vol. IX, trial proceedings]. According to Spiers, Robert eventually came into full administrative compliance and had remained in compliance up to that time [Tr.1913, Vol. IX, trial proceedings].

On July 19, 2013, Francis Wozniak testified that he was raised on a farm, had farmed for the past approximately six years, runs a slaughterhouse, and was currently partners in farming with Jim Huffman [Tr.2028-29, Vol. IX, trial proceedings]. Wozniak also testified that he and Robert sharecropped[16] for 20-25 percent of the crops, or the cash equivalent [Tr.2030, Vol. IX, trial proceedings]. Wozniak testified to observing for approximately six to seven years the development of Robert's farm [Tr.2033, Vol. IX, trial proceedings]. Wozniak stated that there is "no question" that Robert is farming. [Tr.2046-47, Vol. IX, trial proceedings]. Wozniak also testified that he had been close to Robert's lagoons many times and that the odors were not obnoxious or

[16] Share cropping occurs when a farmer raises crops for the owner of a piece of land and is paid a portion of the money from the

overpowering [Tr.2044, 2050-51, Vol. IX, trial proceedings]. Wozniak also testified that the lagoons are a part of Robert's farming operation and that the fields to which Robert's biosolids have been applied have produced a lot more growth than the crops without septage [Tr.2052, Vol. IX, trial proceedings].

Following several days of testimony, the trial was continued. When the trial resumed on September 12, 2013, Pete Fellman testified that he has been a farmer in Washington beginning in 1980 and then in Alaska since 1987 [Tr.2090-91, Vol. X, trial proceedings]. Fellman was a member of the Farm Bureau [Tr.2102, Vol. X, trial proceedings]. Fellman also worked as a legislative staffer for Representative John Harris for 12 years [Tr.2090, Vol. X, trial proceedings]. Fellman has been around hogs and cattle all of his life [Tr.2091, Vol. X, trial proceedings]. To Fellman, manure has an odor to which one becomes accustomed [Tr.2095, 2112, Vol. X, trial proceedings]. Fellman also testified that lagoons allow the waste product to decompose and become very fertile dirt [Tr.2098, Vol. X, trial proceedings]. Based on his lifelong experience in dealing with farmers and with farming, Fellman testified that lagoons are very commonly used in farming in the lower 48 states and are also somewhat in use for farming in Alaska [Tr.2099-2104, Vol. X, trial proceedings]. Fellman explained that separate lagoons

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sale of the crops or who receives an agreed share of the crops.

are beneficial for rotational purposes [Tr.2108, 2110, Vol. X, trial proceedings]. Fellman also testified to observing farming equipment on Robert's farm [Tr.2109, Vol. X, trial proceedings]. Fellman testified that Robert's lagoons smelled a little bit - not overwhelmingly [Tr.2112, Vol. X, trial proceedings]. Fellman testified that septage is good fertilizer [Tr.2119-20, Vol. X, trial proceedings]. Similar to the testimony offered by the other farmers, Fellman testified that almost all of his income from his non-farm employment went toward keeping his farm operation going [Tr.2132, Vol. X, trial proceedings].

William Smyth testified that he was a retired environmental engineer for the DEC wastewater division in Fairbanks [Tr.2149-50, Vol. X, trial proceedings]. Smyth explained that Robert's operation was permitted under the solid waste division but that Robert required no permitting from the wastewater division [Tr.2151, Vol. X, trial proceedings]. Smyth also explained that DEC requirements are different for lagoons intended for treatment and discharge as opposed to Robert's farming operation, which was for storage and for land application [Tr.2155-56, Vol. X, trial proceedings]. Smyth explained that the wastewater division's concerns with Robert's lagoons ended when an engineer reported that Robert's lagoons were not leaching into the ground and that lagoon liners were not needed [Tr.2156-57, Vol. X, trial proceedings]. Smyth testified that he

responded to odor complaints by visiting Robert's farm 10 to 12 times, but that odors were detected off-site only once or twice [Tr.2162-65, Vol. X, trial proceedings]. Smyth testified that there was no question in his mind that Robert was applying the septage from his lagoons through an irrigation and sprinkler system [Tr.2169, Vol. X, trial proceedings].

At the end of trial, closing arguments were heard. Judge Harbison questioned Robert's counsel, asking, "When is the activity incident to or in conjunction with the agriculture? And when does the other activity take over?" [Tr.2538, Vol. XI, trial proceedings].

In response, counsel, again, clarified for the court, "The concept of principal use is something that [Lanser] has read into the law in this case, and perhaps is leading the court down a path on this. That's not what the Right to Farm talks about - that the principal use of the property must be for a farm." [Id.]

The court then reluctantly conceded, "It's not in the statute. I think I was that one who wrote it in in summary judgment. It's not in the statute." [Tr.2538-39, Vol. XI, trial proceedings]. In spite of recognizing its error, the court nevertheless excused its mistake, stating that it had tried to find a way to "reconcile the statute" because, according to the court's view, "clearly it wasn't the legislative intent to allow

the other activity to be the primary activity and farming to be an acre of land that happens to generate $1000 that we've heard from about five to 10 witnesses." [Tr. 2539, Vol. XI, trial proceedings].

(5) The November 7, 2013 Order arbitrarily decided against Robert. Following the 11-day trial, the court issued its November 7, 2013, Order [R.002484-002506]. Although the Order conceded that it had previously erred on summary judgment regarding the so-called "primary purpose" of the septage lagoons, the Order nevertheless construed the meaning of AS 09.45.235 against Robert [R.002501 n.14].

It is respectfully submitted that the Order, as written, is plainly result-oriented. And, although Alaska's Right to Farm Act is very broadly written to protect farming activity from private nuisance suits, in its apparent desire to rule against Robert, the court's Order significantly and arbitrarily narrowed the scope of the statute's application in order to deny Robert its protections, notwithstanding the legislature's mandate to protect farms. Indeed, Robert's counsel requested the court conduct a site visit to verify the existence of Robert's farm. In response, the court outright declined this request, evidencing a personal distaste for the concept of septage [Tr.45-6, Vol. I, trial proceedings].

The Order found by clear and convincing evidence that

Robert began acquiring agricultural land in 2005 and that Robert's Eielson Farm Road property was currently planted with oats, pasture grass, and that a portion was also then under cultivation in a sharecrop arrangement [R.002487-88]. The Order found by clear and convincing evidence that Robert's land supported four cows and one horse, that Robert was actively haying some of his fields and that he intended to sell sod, which encompassed five acres of his land [R.002487-88]. The Order also found that applying human septage to enrich soil is an acceptable and desirable source of readily-available fertilizer [R.002490]. The Order stated that many of the witnesses testified that the septage stored in Robert's lagoons was not nearly enough to fertilize Robert's fields [R.002499]. Numerous exhibits were admitted in support of the above-stated factual findings, including photographs of Robert's livestock, equipment, fields, and farming operations [Exc.000241-64].

The court made a very significant error when the Order stated of Robert's commercial farming, "So far, [Robert] has not sold any hay. In fact, to date, he has not sold any crops at all, nor has he sold any farm products, nor has he received any income from farming." [R.002488]. In support of the court's finding that Robert would not be considered a "commercial farm" for purpose of the Right to Farm Act, the Order repeated the same misstatement that Robert had never sold any crops

[R.002503]. The court committed clear error when it failed to take into account evidence of Robert's commercial sales of hay in 2007 and in 2008, and his donation of hay to Camp Li-Wa in 2008, which evidence was admitted as evidence on July 18, 2013 [Exc.000238; Exc.000239 Exc.000240].

Previously on summary judgment, the trial court dismissed Lanser's public nuisance and damages claims [R.002300-18]. At trial, Lanser's sole remaining claim was that he allegedly suffered a private nuisance. As discussed, supra, there was scant evidence at trial supporting Lanser's private nuisance claim. Although the Order collectively summarized the neighbors' testimony regarding odors, it made no specific findings that would support finding for Lanser's private nuisance. The Order did not specify that Lanser had suffered significant harm, and it performed no analysis so as to determine the gravity of Lanser's alleged harm, nor did it conduct any balancing of factors to determine the utility of Robert's activities.[17] The Order commented, "The odors from the septage lagoons often prevent Lanser and his neighbors from engaging in ordinary outdoor activities on their land.. . .[T]he odors interfere with ordinary activities such as barbequing, gardening, and sitting

[17] See AS 09.45.255; Restatement (Second) of Torts § 826 (1965); also *see* Id. at § 825 cmt. b and cmt. c; Restatement (Second) of Torts §§ 827, 828, 941; W. Page Keeton et al., *Prosser and Keeton on Torts* §§ 87, 88A (5th Ed. 1984); *Trails North, Inc.* v.

outdoors." [R.002495-96]. It should be noted, however, that Lanser never testified to his barbequing, gardening, and sitting outdoors. Rather, Lanser testified that he worked in the subdivision building houses five days a week during normal business hours [Tr.1026, Vol. V, trial proceedings]. Although Lanser testified to noting intermittent septage odors, he never testified that the odors interfered with his work in any particular way or limited his livelihood. Notably, quite a number of witnesses testified to never smelling septage off of Robert's property and the DEC personnel managed only one time to detect odors when offsite. In spite of the mixed testimony regarding odors and the dearth of evidence concerning Lanser's suffering a private nuisance, the Order conclusorily surmised, "The odors clearly interfere with Lanser's outdoor activities on the land, which include building houses and preparing the land for development." [R.0002496].

In numerous other ways the Order took a stance particularly critical of Robert's activities, arbitrarily creating negative conclusions concerning what the court supposed were Robert's intentions. From Robert's testimony that he stored septage at his farm beginning in 2005 and that he first began land applying the biosolids from his lagoons in 2010,[18] the court negatively

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Seavey, 1999 WL 33958785.

[18] Robert previously testified that he first directly land applied

inferred that Robert's reasons for not earlier land-spreading were not to be believed [Tr.002490]. In fact, Robert had testified that he was accumulating septage to allow it to further naturally degrade, and that he was only able to apply it when he was not experiencing issues with his equipment and when the ponds and dirt thawed and the fields were dry enough to disk it in, as required by regulations for vector reduction.[19] Robert also testified that, in 2010, once Big Foot Pumping & Thawing began delivering its septage, he soon had sufficient quantity to begin land application [Tr.796-97, 808-10, 821-22, 886, April 5, 2012; Tr.2366-67, Vol. XI, trial proceedings].

The Order overestimated the volume of Robert's septage based on the total annual volume decline of septage deposited at GHU without taking into consideration that the Fairbanks population dropped from 35,252 in 2009[20] to 31,535 in 2010.[21] From the court's imagined vast and presumed unused volume of septage, the court drew further negative conclusions. The Order stated, "[I]f the lagoons were intended to store septage for use in farming, Riddle could, and should, be applying all of the

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septage to his farm even prior to 2010, but that the first land application from his lagoons took place in 2010 [Tr.876, 884-86, Vol IV. April 5, 2012].

[19] 40 CFR § 503.33(a)(5) and (b)(10).

[20] http://www.idcide.com/citydata/ak/fairbanks.htm (last visited July 21, 2015).

[21] http://live.laborstats.alaska.gov/cen/dp.cfm#h (last visited July 21, 2015).

septage to his land" and arbitrarily opined that Robert's intention in applying septage was "more to dispose of the septage than to prepare the land for farming." [R.002495-97, 002499]. The Order stated that the evidence "suggests that [Robert's] land is no longer an 'agricultural facility'" [R.002501], although the Order acknowledged that Robert had farming equipment and was growing sod for sale [R.002503].

The Order ultimately decided that AS 09.45.235 does not protect Robert from private nuisance claims because, in the court's view, the lagoons are not an "agricultural operation" "incident to or in conjunction with agricultural activities." Rather, in the mind of the trial court, the lagoons qualify as septage treatment because they undergo the processes of evaporation and degradation, which processes are natural and unavoidable if left alone to do its work. In fact, the processes continue even after the septage is plowed into the ground to join the soil microbial community [R.002504]. Bacterial conversion is a natural chemical process that converts gaseous nitrogen into compounds such as nitrate or ammonia which can be used by plants.

Robert testified that, in addition to storing and beneficially applying septage, he was also making compost which he intended to spread as fertilizer once he obtained the DEC permit to do so. In response, the court cynically speculated

that Robert would not be able to obtain the required permit to apply compost and on that basis concluded that Robert's compost could not be intended for commercial farming purposes [R.002498].

At every turn - regardless of whether Robert land spread the septage and/or stored the septage - the court suspected ulterior non-farming intent and contorted the Right to Farm Act against Robert. In the end, the court entirely discounted the plentiful testimony that Robert farmed his land every year beginning in 2005 and that the septage was stored with the intent of land spreading to improve crop production and that Robert, in fact, did apply septage to his fields.

(6) The abatement Order and sanctions. In its April 4, 2014 Order, the court ordered that Robert put odor abatement in place by means of an Ecolo deodorizer system and employ Nortec and an Ecolo technician to provide Robert with recommendations [R.002343]. The court entered its Amended Final Judgment on April 1, 2015, permanently enjoining Robert from making an odor nuisance. The court ordered Robert to meet the terms of the court-imposed odor abatement plan and indicated that it would award sanctions, attorney fees, and costs against Robert, plus post-judgment interest, in undetermined amounts [R.003883-86].

In its April 27, 2015 Order Re: Attorney's Fees the court

awarded Rule 37(g) costs and fees against Robert in the total amount of $15,003.53 [R.003867]. The court awarded Lanser his full costs pursuant to Rule 54 and 79, and 40 percent of his Rule 82 attorney's fees as the prevailing party [R.3867-3873]. The Clerk's Ruling On Cost Bill, dated July 20, 2015, later adjusted Lanser's costs to $2,267.42 [Exc.000233]. The court enhanced Lanser's Rule 82 fees above the standard 30 percent based on two specific factors: "vexatious or bad faith conduct" and "reasonable of the claims and defenses by both sides." [R.3879]. The superior court found that Robert "made material misrepresentations to both the Borough and the DEC when he applied for his original permits," and that Robert's Right to Farm defense was unreasonable. The enhanced Rule 82 fees awarded amounted to $71,524.26 [R.3879-82; Exc.000227-30]. The Amended Final Judgment of April 1, 2015, awarded a total judgment of $88,794.94 [Exc.000236].

STANDARD OF REVIEW

The Court exercises its independent judgment in reviewing the superior court's interpretation of a statute and decides *de novo* how to construe the Alaska Statutes, adopting rules of law that best reflect precedent, reason, and policy.[22] A trial court's factual findings are reviewed under a clearly

[22] *Windel v. Mat-Su Title Ins. Agency,* 305 P.3d 264, (Alaska 2013); *Waiste v. State,* 10 P.3d 1141, 1144 (Alaska 2000).

erroneous standard. A factual finding is clearly erroneous when the reviewing court is "left with a definite and firm conviction on the entire record that a mistake has been made.[23] A trial court's grant or denial of injunctive relief is reviewed for abuse of discretion.[24] Awards of costs and attorney's fees are reviewed for abuse of discretion, which exists if an award is arbitrary, capricious, manifestly unreasonable, or improperly motivated.[25] The decision to award enhanced attorney's fees is reviewed for abuse of discretion and will be overturned where the award is manifestly unreasonable.[26] A trial court's decision to impose sanctions for discovery violations is reviewed for abuse of discretion.[27]

ARGUMENT

I. The Right to Farm Law mandates that Robert's farm is not a nuisance and cannot become a nuisance.

AS 09.45.235, Agricultural Operations as Private Nuisances, specifies two circumstances in which either an agricultural facility or an agricultural operation is not a private nuisance:

(1) An agricultural facility or operation is not and does

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[23] *Fernandes v. Portwine,* 56 P.3d 1 (Alaska 2002).
[24] *North Kenai Peninsula Rd. Maintenance Serv. Area v. Kenai Peninsula Borough,* 850 P.2d 636, 639 (Alaska 1993).
[25] *Fernandes v. Portwine,* 56 P.3d 1 (Alaska 2002).
[26] *Alaska Fur Gallery, Inc. v. First Nat. Bank Alaska,* 345 P.3d 76, 84 (Alaska 2015); *Williams v. GEICO Cas. Co.,* 301 P.3d 1220, 1225 (Alaska 2013)(citing *DeNardo v. Cutler,* 167 P.3d 674, 677-78 (Alaska 2007)).
[27] *Whittle v. Weber,* 243 P.3d 208, 211 (Alaska 2010).

not become a private nuisance "as a result of a changed condition that exists in the area of the agricultural facility if the agricultural facility was not a nuisance at the time the agricultural facility began agricultural operations."

(2) An agricultural facility or operation is not a private nuisance "if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a soil conservation plan developed and implemented in cooperation with the district."

Robert's farm is not a private nuisance and cannot become a private nuisance because both statutory circumstances apply to this case.

(a) Agricultural facility. Robert's Eielson Farm Road property, his farm equipment, his storage buildings, his fenced areas, and the fertilizer ponds all qualify as an "agricultural facility" under the Right to Farm Act. AS 09.45.235(d)(1) defines "agricultural facility" as meaning:

> Any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment that is used or is intended for use in the commercial production or processing of crops, livestock, or livestock products, or that is used in aquatic farming.

The evidence is that Robert used his farm land, farm machinery, and farm equipment for the commercial production of crops and livestock. Robert sharecropped with Fritz Wozniak for

20-25% of the crops produced, which is a commercial transaction involving a valuable commodity. Robert grows oats and hay for feed for his cows, all of which are also valuable commodities.[28] [Tr.664-65, April 4, 2012; Tr.814, April 5, 2012]. As previously discussed, receipts of Robert's hay sales in 2007 and 2008 were admitted to trial [Exc.000238; Exc.000239; Exc.000240].

The trial court acknowledged that the Right to Farm Act does not define "commercial" production, that the cost of farming often exceeds the income from farming, and that there is no minimum level of sales for a farm to be considered "commercial" [R.002501-03].

Moreover, the broadly written Right to Farm Act considers an "agricultural facility" to be such where one also *intends* for the facility to be used for commercial production. The Order also acknowledges Robert's intent to sell sod [R.002488; R.002503]. The Order even stated, "The court does not doubt that [Robert] hopes to use the lagoons for both treatment of septage *and for commercial farming in the future.*" (emphasis added) [R.002505]. However, ignoring its own finding that Robert's hope or intent is to sell sod, the court nevertheless considered it

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[28] For Alaska crop values, see:
http://www.nass.usda.gov/Statistics by State/Alaska/Publications/Farm Reporter Releases/frmrpt02.pdf (last visited July 22, 2015).
For hanging weight price of Sitka beef, see:
http://www.alaskameat.com/Sales.html (last visited July 22,

significant that it could not determine whether Robert intended to produce crops *for profit* [R.002503].

It is submitted that the court erred in considering any so-called "for profit" factor. The qualifying element to an "agricultural facility" for purposes of the Right to Farm Act is not "for profit" but, rather, is the commercial use or the intent of commercial use.

Any argument that a farm must produce income in order to be considered a "legitimate farm" is put to rest by federal legislation. The federal government, through its farm bills, provides subsidies to farmers in order to survive. *See* Food, Conservation and Energy Act of 2008, H.R. 2419, Pub. Law 110-234, *see also* The Agricultural Act of 2014, H.R. 2642, Pub. L. 113-79. In fact, the federal government has been providing financial assistance to farmers in one way or another since at least 1933 when Congress passed the Agricultural Adjustment Act. *See* Pub. L. 73-10, 48 Stat. 31. The superior court heard testimony with respect to farm subsidies. Specifically, Dr. Charles Knight testified that he knew of such subsidy programs. [Tr.1754-55, 1761-62, Vol. VIII, trial proceedings]. Dr. Knight indicated that, although these subsidies do exist, inclusion in them is not required to be considered a farmer. [Id.]. However, it is clear that these federal programs are necessary because

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2015).

farms do not always turn a profit. As such, any interpretation of the Right to Farm Act requiring a farm to be profitable in order to trigger the protections of the Act does not comport with the simple realities of farming as reflected by the farm bills.

Moreover, testimony in the proceedings below established that farming is ordinarily always subsidized by the farmer's non-farm income.

Fellman testified, "almost every farmer that I know has either an outside job, or a spouse or a son or a daughter are contributing to the farm income." [Tr.294, Vol. II, April 3, 2012]. Wrigley testified, "I do other things too, and I do that out of necessity. I wish that my farm would pay enough that I didn't have to work as well, or that my wife didn't have to work." [Tr.454, Vol. II, April 3, 2012]. Wozniak testified that he was able to farm because he was retired with a pension, and stated with regard to non-farm income, "Usually there's somebody in their family that's working someplace else. My relatives are all - there's - one of the wives or something has got a job someplace else." [Tr.578, Vol. III, April 4, 2012]. Illingsworth testified, "[Y]ou really can't support a farm without having a second job." [Tr.1043, Vol. V, trial proceedings]. Dean Lawson may have stated it best when he testified, "Our saying used to

be, 'For every successful farmer, there's a wife that works in town.'" [Tr. 139, Vol. I, trial proceedings].

It is also submitted that Robert's Eielson Farm Road property, machinery, and fertilizer lagoons are an "agricultural facility" because he has produced valuable feed crops and kept livestock continuously since 2005 and, moreover, because Robert also intends to produce sod suitable for sale. Therefore, pursuant to AS 09.45.235(a), Robert has an "agricultural facility" and, as such, it is not and does not become a private nuisance as a result of a changed condition in the area of the facility.

The broadly worded Right to Farm Act also provides that an agricultural facility is considered to begin "agricultural operations" on the "date on which any type of agricultural operation began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology." (emphasis added). As Judge Olsen correctly decided, the statute protects not any particular way of farming, but protects the land itself [R.000249].

Robert's agricultural facility also is not a private nuisance because, during all relevant times, Robert operated the facility under Division of Agriculture, Alaska Department of Natural Resources, Farm Conservation Plans that were in place and were modified and which run with the land [Tr.701-08, 721,

724, April 5, 2012].

(b) Agricultural operation. Robert's farming activities, including his storage of septage in the lagoons, also qualify as an "agricultural operation" and are protected under the Right to Farm Act, as well. "Agricultural operation" under AS 09.45.235(d)(2)(A), means:

> [A]ny agricultural and farming activity such as the preparation, plowing, cultivation, conserving, and tillage of the soil; dairying; the operation of greenhouses; the production, cultivation, rotation, ***fertilization***, growing, and harvesting of an agricultural . . . crop or commodity; the breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock; forestry or timber harvesting, manufacturing, or processing operations; the ***application and storage of*** pesticides, herbicides, animal manure, treated sewage sludge or chemicals, compounds, or ***substances to crops, or in connection with the production of crops or livestock;*** the manufacturing of feed for poultry or livestock; aquatic farming; the operation of roadside markets. (emphasis added).

Moreover, Robert's "agricultural operation," including his applying and storing substances to crops or in connection with the production of crops or livestock, also includes:

> [***A]ny practice conducted on the agricultural facility as an incident to or in conjunction with activities described in (A) of this paragraph,*** including the application of existing, changed, or new technology, practices, processes, or procedures." (emphasis added)

AS 09.45.235(d)(2)(B). Under the Right to Farm Act, Robert runs an agricultural operation and his storage of septage is, itself, an agricultural operation, which is not and does not become a private nuisance regardless of whether Robert's agricultural

operation is commercial or is intended to be commercial.

Incident to fertilizing the soil, Robert spread septage on his Eielson Farm Road fields beginning in 2009 and continuing through 2010 and beyond. Incident to fertilizing soil by spreading septage, Robert collected and stored the septage in lagoons that were situated on his farm beginning in 2005. These activities are encompassed by the definition of an "agricultural operation" under AS 09.45.235 and, as such, are not and do not become a private nuisance.

(c) The protective provisions of the Right to Farm Act apply to Robert's agricultural facility and agricultural operation. AS 09.45.235 states that the protective provisions do not apply to private nuisance liability resulting from improper, illegal, or negligent conduct of agricultural operations or flooding caused by the agricultural operation. AS 09.45.235(b).

At trial, Lanser unsuccessfully argued that, because Robert was not in full compliance for a time with DEC's reporting requirements, the protections of the Right to Farm Act should not apply to Robert's agricultural operation. However as Judge Olsen correctly stated in the Injunction Order, while the allegations of failing to create or maintain records of the dates septage was applied "are potentially serious, they do not overcome the protection of the Right-to-Farm statute. Even if these were remedied, they would do nothing to reduce the odor

produced by the septage lagoons." [R.000254]. Robert agrees with the trial court's analysis and adds, too, that the court did not find that the odor complaints arose from the DEC permitted land application of septage. Rather, the factual finding of the court from the evidence at trial was that the origin of any odors and of the allegations of private nuisance was the septage lagoons, not the land application of septage [R.002495]. As previously discussed, Robert's lagoons required no DEC permitting and, therefore, the lagoons could not be administratively "out of compliance."

Similarly, Judge Harbison struggled with DEC's refusal to revoke Robert's permit for land application of biosolids. The DEC, after issuing Robert's permit and asserting that it could revoke the permit if odors become a nuisance and if the nuisance is not abated, made a policy determination that the Right to Farm Act prohibited the DEC from enforcing against Robert the odor abatement referenced in its decisional document [R.002492].

Of note, the present case does not involve an appeal from an agency decision. Nevertheless, it is submitted that the DEC's interpretation that the Right to Farm Act precludes the DEC from taking enforcement action against Robert for a private nuisance odor claim amounts to a policy decision based upon a reasonable

interpretation of the statute.[29] Arguably, the DEC could revoke a permit for a public nuisance. But, as the DEC correctly interpreted AS 09.45.235, Robert's farm "is not and cannot become" a private nuisance and, therefore, the DEC's odor abatement condition contained in its Decisional Document has no application.

(d) The court's approach undermines the Right to Farm Act. As discussed, *supra,* the legislative findings accompanying AS 09.45.235 recognized that conflicts and tension exist between agricultural operations and the urban and suburban land uses. Because those conflicts threaten to force the abandonment of agricultural operations and the conversion of agricultural land to nonagricultural uses and the permanent loss of the agricultural land to the economy and to the human and environments of the state, the enactment of the Right to Farm Act clearly was necessary.

Contrary to the purposes of the statute, the November 7, 2013, Order decided that the court can arbitrarily determine to turn off or turn on the protective provisions of AS 09.45.235 by simply ruling upon the principal use of a property, a provision which does not exist in the statute but, instead, was arbitrarily "read into" the law by the court in order to achieve

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[29] *State, Dept. of Health and Social Services, Div. of Public Assistance v. Gross*, 347 P.3d 116, 121 (Alaska 2015).

what it is respectfully submitted was an improper result. In so doing, the trial court improperly installed a sensitive toggle switch on the Right to Farm Act which turns off the protections whenever a farming facility is deemed - in the complaining property owner's view - to be non-commercial due to loss of profits, bad weather, crop blight, or the application of fertilizer that does not meet the neighbor's vision of how a farm is supposed to operate. Such a ruling leaves virtually every agricultural facility in Alaska open to defending lawsuits challenging a farm's noisy, dirty, or smelling operations as not being incident to agricultural operations to some degree. Instead of precluding any such lawsuit pursuant to AS 09.45.235, the trial court's ruling created a litigation field day for newcomers to a farming region who are adverse to neighboring agricultural activities.

The evidence supports the fact that Robert's septage lagoons are a legitimate part of his farming operations. The trial court incorrectly applied criteria concerning whether Robert's activities were "principally" agricultural, or whether his agricultural operations were "for profit," or whether Robert applied a sufficient amount of septage to his soil to render credible the abundant testimony that Robert was operating a legitimate farm. There was no evidence that Robert did not

intend to operate a commercial agricultural operation. Robert testified of his intent to sell sod and to further expand his farming operations. But, the record is also highly suggestive that the court simply would not reconcile Robert's claimed intent to farm with the financial advantage Robert had in accepting septage from FP&T and from Big Foot Pumping & Thawing. It would be an odd perversity, indeed, if a court were to preclude the protections of the Right to Farm Act simply because a farm's operations were particularly viable financially.

The final judgment of the trial court should be reversed.

II. It was error to find Robert's septage lagoons a private nuisance.

Notwithstanding the court's error in foreclosing to Robert the protections of AS 09.45.235, it was also error for the court to find that Robert's lagoons constituted a private nuisance.

The Alaska Statutes define a nuisance as a substantial and unreasonable interference with the use and enjoyment of property, including water. AS 09.45.255. An injunction against a private nuisance will be generally granted only where there is a strong and mischievous case of pressing necessity, and not because of a trifling discomfort or inconvenience suffered by the complainant. *Lindeberg v. Doverspike,* 2 Alaska 177 (1904).

The Alaska Supreme Court has cited to the Restatement when reviewing claims of private nuisance. *See Parks Hiway*

Enterprises, LLC v. CEM Leasing, Inc., 995 P.2d 657, 666 (Alaska 2000)(citing Restatement (Second) of Torts §§ 822A, 822B, 834).

As stated, *supra*, testimony regarding detecting odors offsite of Robert's farm was mixed and was entirely inconclusive as to severity. In addition, the court did not articulate and balance factors necessary to warrant injunctive relief. According to the Restatement (Second) of Torts, § 826 (1965) and cmt b and c; §§ 827, 828, 941, important factors to determine the gravity of harm to a plaintiff include:

(a) **The extent of the harm involved.** In the proceedings below, Lanser testified only to detecting intermittent odors of varying strengths during the warm season. Lanser did not testify that his own activities were impacted in any particular way.

(b) **The character of the harm involved.** Lanser testified to smelling odors that he did not associate with farm smells, and he did not testify that his activities were impacted in any particular way.

(c) **The social value that the law attached to the type of use or enjoyment invaded.** It is submitted that the social value of a workplace free from neighboring farmland smells is likely very low, especially in a known farm area.

(d) **The suitability of the particular use or enjoyment to the character of the locality.** It is submitted that the character of the Eielson Farm Road agricultural lands was

originally intended for farming and provided for only one residence appurtenant to each individual farm [Tr.704, Vol. IV, April 5, 2012]. The evidence is that Lanser's tract housebuilding activity occurred in an area that he had subdivided in a location particularly unsuitable for concentrated residences.

(e) **The burden on the person harmed of avoiding the harm.** With full advance knowledge that the area was agricultural, Lanser developed his subdivision and built residences after Robert had already started farming. Lanser was aware that Robert was storing septage on his farm, but Lanser gambled that he could use administrative clout and/or legal avenues to force Robert to do something about farm odors, should such become a concern of Lanser's [Tr.485-88, Vol. II, April 3, 2012].

The Restatement notes the difficulty of ascertaining the significant of an alleged private nuisance where the interference complained of consists solely of personal discomfort or annoyance, as is the case here. *See* Restatement (Second) of Torts § 821F cmt. d (1965).

In weighing a defendant's conduct, the Restatement (Second) of Torts § 826 (1979) lists the following factors:

(a) **The social value that the law attached to the primary purpose of the conduct.** As discussed, *supra,* the Legislature has placed a very high value on fostering and encouraging

agriculture in Alaska and specifically protects agriculture from private negligence suits. *See* AS 09.45.235. A high social value is also placed on the recycling of valuable biosolids, which laudable value is by now beyond disputing.

(b) **The suitability of the conduct to the character of the locality.** Robert's farming activity was perfectly suited to the Eielson Farm Road properties.

(c) **The impracticability of preventing or avoiding the invasion.** It is submitted that it is impractical to expect farms not to generate dust, noise, and smells because agricultural activities involve: operating noisy equipment and keeping noisy livestock; hauling, digging and tilling soil; and, odors that animals and fertilizer lagoons generate.

According to the Restatement, whether an interference was unreasonable is determined by use of a balancing test: if the gravity of the harm outweighs the utility of the conduct, the invasion is unreasonable. Restatement (Second) of Torts § 826 (1979). Also, the Restatement describes "significant harm" as a harm of importance involving more than slight inconvenience or petty annoyance and that there must be a real and appreciable invasion of the plaintiff's interests. Restatement (Second) of Torts §821F cmt. c (1979).

To the contrary, the Order issued on November 7, 2013, failed to conduct any balancing of interests whatsoever, which

amounts to an abuse of discretion. Had the court properly conducted such an evaluation, it should have found in Robert's favor on the private nuisance claim. Because the trial court did not conduct such and evaluation, it is submitted that the factual record is ample enough for this Court to reverse the trial court's finding that Robert's farm was a private nuisance.

III. Fee award and sanctions.

(a) Attorney's fees. The superior court abused its discretion when it determined that an award of enhanced fees was appropriate in this case. The superior court turned to two specific factors in awarding enhanced attorney's fees: "Riddle misrepresented his use of his property and did not bring his Right to Farm defense in good faith." [R.003879].

(1) First, the superior court abused its discretion when it relied on Robert's interactions with the DEC as part of its basis for an award of enhanced fees. "The purpose of Civil Rule 82 is to compensate a prevailing party partially, not fully, for attorney's fees incurred in litigation." *Demoski v. New*, 737 P.2d 780, 788 (Alaska 1987) (emphasis added). When an award of Rule 82 fees is enhanced for bad faith conduct, the conduct at issue must have occurred during the litigation. *Alderman v. Iditerod Properties, Inc.*, 104 P.3d 136, 145 (Alaska 2004). The court may not consider "actions taken during the underlying transaction or other litigation between the parties."

Id., *see Cole v. Bartels*, 4 P.3d 956, 961 at n.4 (Alaska 2000).

The superior court found that "Riddle made material representations to both the Borough and to the DEC when he applied for his original permits regarding his intended use of the land." [R.003879] [internal quotations omitted]. The issue before the court in this case was not whether Robert made misrepresentations to obtain his DEC permit but, rather, whether Robert's farm operations created a private nuisance based on conduct that occurred in 2010, years *after* the permit was issued in 2007. This fact is evident from the procedural history of this case. Lanser initially attempted to join the DEC as a party to the underlying action. [R.002983-84]. In doing this, Lanser claimed that the DEC was negligent and had breached its duty to regulate Robert's permit pursuant to AS § 46.40.020 et seq.[30] [R.002999]. The DEC was later dismissed from the case and, as a result, any claims against it were dismissed as well. [R.002914]. The superior court later found in its November 7, 2013 Order that "the ADEC took the position that the Right-to-Farm Act prevents it from enforcing the odor control requirements of the permit." [R.002492]. Furthermore, in the Order re: Attorney's Fees, Lanser was denied "attorney's fees incurred by Lanser when he sought to stop Riddle's conduct

[30] AS 46.40.010 to 46.40.070 was repealed by SLA 2005, ch. 31, § 18, effective July 1, 2011. Lancer's Complaint for Injunctive

through means outside this litigation." [R.003870]. The superior court reasoned "Whether or not these fees were incurred in good faith efforts to 'secure voluntary compliance' by Lanser and his counsel is irrelevant, because they were not directly involved in litigating this case." [R.003870]. Lanser was also denied fees for his defense "against the Attorney General's motion to dismiss." [R.003870]. Nevertheless, the superior court enhanced attorney's fees on the basis of Robert's alleged conduct with respect to the permitting process.

DEC was not a party to the underlying action and specifically adopted a wait-and-see approach in this matter. The only issue actually brought to trial was Lanser's private nuisance claim. [R.002484-87]. As such, enhancing attorney's fees in favor of Lanser with respect to the permitting process is unduly punitive. Robert was essentially punished for alleged behavior regarding an underlying transaction that was not at issue in this case. This underlying transaction did not even involve Lanser, the sole plaintiff in this matter. Furthermore, the superior court's enhanced award based on the finding that Robert made "misrepresentations" is in direct contradiction with its refusal to award attorney's fees for Lanser's attempts to secure compliance outside of this litigation. The superior court specifically acknowledged that Lanser's extra-judicial attempts

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Relief was filed December 20, 2011.

to "secure voluntary compliance" were irrelevant, and that Robert should not bear the cost of the DEC's motion to dismiss. Yet, the court also took the position that it enhanced attorney's fees because "Riddle did misrepresent his intentions and actions both before and during litigation and because *his good faith compliance could have prevented several thousand dollars' worth of attorney's fees from being incurred . . .*" [R.003881]. As the court properly found, Lanser's attempts to secure voluntary compliance were irrelevant. This rationale should not then form the basis for an enhanced attorney's fee award.

It is clear that the superior court relied on issues outside of the scope of this litigation in order to justify an enhanced award under Rule 82. It is respectfully submitted that the superior court abused its discretion in this regard. Lanser should not be allowed to benefit by way of recovering enhanced attorney's fees for alleged conduct that was not part of this litigation and to which Lanser was not a party.

(2) Second, the superior court's finding that Robert did not bring his Right to Farm Act defense in good faith was clearly erroneous and, as such, an enhanced award on that basis was an abuse of discretion. A party need not prevail on his claims or defenses for them to be reasonable. *Marathon Oil Co. v. ARCO Alaska, Inc.*, 972 P.2d 595 (Alaska 1999). *Marathon Oil*

Co. makes clear that the court abuses its discretion in finding that a party is unreasonable in their position when that position raises a legitimate issue. *Marathon Oil Co.*, 972 P.2d at 605. In *Marathon Oil Co.*, Marathon challenged an arbitration award. *Id.* This challenge "raised a legitimate issue about the arbitors' power under the agreement and the standard under which their interpretations of the agreement should be reviewed." *Id.*

Marathon Oil Co. is distinguished from cases such as *Cole v. Bartels*, 4 P.3d 956 (Alaska 2000) and *Crittel v. Bingo*, 83 P.3d 532 (Alaska 2004). In *Cole*, the superior court did not abuse its discretion when it found Cole's position to be unreasonable. *Cole*, 4 P.3d at 960-61. Cole was obligated by statute to disclose the existence of wood decay to a buyer. *Id.* In that case, Cole's position that she was aware of decay, but believed that it was only cosmetic, did not relieve her of the statutory duty. *Id.* As such, the superior court did not abuse its discretion in enhancing fees based on the unreasonableness of Cole's defense. *Id.*

Crittell involved a situation in which the underlying claims themselves were fraudulent in nature. *Crittell*, 83 P.3d at 537. The court found that the Crittells engaged in fraud and undue influence when they induced Houssien, who lacked testamentary capacity, to execute a will. *Crittell*, 83 P.3d at 534. In that case, the court did not abuse its discretion when

it enhanced attorney's fees for bad faith and vexatious conduct. *Crittell,* 83 P.3d at 537-38.

Robert's case is not a situation like *Cole* or *Crittell.* In those cases, the parties' positions had no legal basis. In *Cole,* Cole knew of a defect and failed to meet the statutory duty to disclose that defect. However, Cole chose to pursue her defense despite admitting that she knew, yet failed to disclose, the defect. In *Crittell,* the Crittells pursued a fraudulent claim from the inception of the case. These are the kinds of situations in which a claim or defense is unreasonable, not cases where a reasonable statutory interpretation is defended.

As discussed in detail, *supra,*[31] Robert's Right to Farm Act defense was reasonable and brought in good faith. As in *Marathon Oil Co.,* which raised legitimate issues about the scope and interpretation of an agreement, Robert's defense raised legitimate questions with respect to the interpretation of the Right to Farm Act. Specifically, Robert's defense raised valid issues regarding the interpretation of terms such as "agricultural facility," "farming activity," and "agricultural operations," among others. [R.00439].

On April 5, 2012, per Judge Olsen, the court found on the record that Robert was operating a legitimate farm [R.003858-61]. The court also found that "There are allegations by the

plaintiff that the septage operation has also failed to comply with other permitting requirements. While these allegations are potentially serious, they do not overcome the protection of the Right-to-Farm statute." [R.00254]. Judge Olsen also found that "farmers who reviewed [Robert's] operation classified his farm as a legitimate farm." [R.00251]. Judge Harbison even denied summary judgment on the basis of whether the "principal use" of Robert's property was agricultural [R.002308]. As previously discussed, the ill-conceived "principal use" theory was eventually withdrawn and reworked. However, that decision at least implies that Robert's operations arguably fell within the Right to Farm Law.

In determining that Robert's Right to Farm Act defense was unreasonable, the superior court later found that

> Riddle[] misrepresents the legal effect of Judge Olsen's denial of a temporary injunction at the beginning of the litigation. The fact that Judge Olsen denied the request for a temporary injunction does not have any bearing on whether Riddle's defense was brought in good faith. To assert otherwise is to distort the standard of proof and depth of evidence required to obtain a preliminary injunction compared to that which is considered when making a final judgment. [R.003880].

The superior court's position was, essentially, that Robert was expected to see into a crystal ball to determine the trial court's ultimate findings before trial began. It is respectfully submitted, however, that Robert reasonably relied on the Right

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[31] See Argument, Part I, pp. 49-58.

to Farm Act itself, discussed *supra*,[32] the opinions of other farmers, the DEC's policy of not enforcing odor abatement out of recognition of the Right to Farm Act, and the superior court's initial findings in the case. Robert's defense was pursued in good faith based on the evidence available to him and the court's substantive orders during the course of the litigation. There was a legitimate issue with respect to Robert's status as a farm. Nevertheless, Robert was found to have acted in bad faith simply by bringing, yet not prevailing upon, a valid defense to the claims against him. Although the superior court ultimately disagreed with Robert's position, it was nevertheless reasonable in light of his activity and the Right to Farm Act. As such, the finding that Robert's defense was unreasonable was clearly erroneous. The superior court abused its discretion when it enhanced attorney's fees on this basis.

(3) The superior court abused its discretion by failing to consider Lanser's bad faith conduct when it awarded enhanced attorney's fees. The trial court has broad discretion to award fees under Rule 82, and this discretion is broad enough to "warrant denial of attorney's fees altogether, so long as the trial court's reasons for departing from the Rule's schedule of fees appear in the record." *Chambers v. Scofield*, 247 P.3d 982, 987 (Alaska 2011).

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[32] See Argument, Part I, pp. 49-58.

In awarding attorney's fees in favor of Lanser, the superior court failed to take into account Lanser's bad faith conduct throughout the litigation of this case. Lancer failed to fully supplement Rule 26 disclosures and withheld information regarding his attempts to shut down Robert's farm. [R.002796-2805]. Robert was forced to seek a protective order when Lanser disseminated private discovery disclosures in furtherance of these attempts. [R.002804, 00936-92]. Lanser also conducted a series of records depositions without providing notice to Robert while a motion to compel regarding those same issues was pending. [R.002804, 003830]. Robert was even subjected to sabotage on his property during the course of this litigation. [R.003837-38]. It should also be noted that Lanser continues to argue that he should be treated as a *de facto* public interest litigant despite the fact that AS §§ 09.60.010 and 09.68.040 do not offer Lanser this protection. [R.002637-39, 003801]. This position is patently unreasonable and contrary to Alaska law.

In its Order re: Attorney's Fees, the court did not take into account Lanser's bad faith conduct during this litigation. This conduct was meant to harass, annoy, and intimidate Robert. Not only was Robert forced to defend Lanser's lawsuit, he was also forced to defend the extra-judicial attempts to shut down his farm and the extra-judicial harassment on his own property. It is respectfully submitted that the superior court abused its

discretion in allowing Lanser to recover enhanced fees despite his own bad faith conduct throughout this litigation.

(b) <u>The court abused its discretion in awarding Rule 37(g) sanctions</u>.

(1) The superior court erred when it found that Robert was unreasonable during discovery and abused its discretion when it awarded Civil Rule 37(g) sanctions. First, Robert's objections to Lanser's discovery requests were reasonable and brought in good faith.

The Court has repeatedly held that willfulness must be demonstrated before sanctions may be imposed under Civil Rule 37. *Strong Enterprises, Inc., et al. v. Seaward*, 980 P.2d 456, 460 (Alaska 1999); *Honda Motor Company, Ltd. v. Salzman*, 751 P.2d 489, 492-93 (Alaska 1988); *Hawes Firearms Co., et al. v. Edwards*, 634 P.2d 377, 378 (Alaska 1981). Willfulness has been defined as the conscious intent to impede discovery, not mere delay or good faith resistance. *Salzman*, 751 P.2d at 492. Here, there was no willful conduct warranting an award of expenses as sanctions.

The language of Civil Rule 65 is supportive of Robert's good faith belief that the findings made in this case were binding, at least in the interim between the injunction determination and trial. Civil Rule 65 states that evidence presented at the preliminary injunction hearing need not be re-

presented at trial on the matter. *See* Alaska R. Civ. P. 65(a)(2). The superior court even referenced Civil Rule 65when it indicated that Judge Olsen's previous findings were preliminary, that evidence need not be repeated at trial, but that additional evidence *may* be presented. [R.000924]. In effect, then, it was reasonable for Robert to rely on any findings made by the court prior to trial.

Robert objected to Lanser's discovery requests regarding Robert's farm operation, exploration of Roberts's separate business, FP&T, exploration of groundwater, and a request to enter onto Roberts's property. [R.00628-29]. Put simply, this case was a private nuisance claim with respect to odors. [R.02998]. It is respectfully submitted that Robert's objections to discovery requests relating to FP&T business records, groundwater testing, and photographs of the property were based on a good faith position that those discovery requests were irrelevant to Lanser's private nuisance claim. [R.00628].

Robert's objections to Lanser's discovery requests were based on findings made by Judge Olsen both on the record on April 5, 2012, and in his written order of May 22, 2012, that Robert was operating a "legitimate farm." [R.0440-41, 03869-70]. Robert reasonably believed that these findings were binding or had precedential value assigned to them. The findings of fact entered by the court were made after hearing approximately 18

hours of testimony. Robert presented many witnesses, including Robert, himself, who were familiar with Robert's farming operation. [R.00434]. Further, there was nothing tentative about the findings made by the Court in making its preliminary injunction decision. The superior court specifically stated, "I found Robert to be operating a legitimate farm. I mean -- that's my -- I guess that is a finding." [R.03860].

Robert also reasonably believed that, based on the superior court's finding that he was operating a "legitimate farm," any records of farming operations, sales, purchasers, or the kinds of crops grown were irrelevant to the private nuisance claim. [R.00629]. Robert's objection was not a willful attempt to impede discovery. Rather, this objection was simply good-faith resistance to Lanser's discovery requests. As such, the superior court's finding that Robert's objections were unreasonable was clearly erroneous. [R.0557-58]. As such, the award of Rule 37(g) sanctions was an abuse of discretion. [R.03866-67].

(2) Second, the superior court abused its discretion when it awarded Lanser excessive and unreasonable costs and fees as sanctions. Even if the superior court did not err in awarding Rule 37(g) sanctions, the superior court abused its discretion when it awarded Lanser $12,050 in attorney's fees and $2,953.53 in costs for discovery sanctions. [R.03866-67].

Alaska Civil Rule 37(g) allows recovery of "reasonable

expenses, including attorney's fees, caused by the conduct." Alaska R. Civ. P. 37(g) (emphasis added). Plaintiff's billings relating to the motion for sanctions are illustrative of the impermissible overcharging discussed in *Demoski v. New*, 737 P.2d 780, 787 (Alaska 1987). There, the Court found duplicative billings, billings for work generated by the fees-seeking party, and billings for work caused by the fees-seeking party's failure to follow the civil rules. *Id.* Given that Alaska case law demonstrates that an award of well under $1,000 is sometimes appropriate for costs directly related to bringing a Motion to Compel, *see Kestner v. Clark*, 182 P.3d 1117, 1125 at n.32 (Alaska 2008), *City of Kenai v. Ferguson*, 732 P.2d 184, 191 (Alaska 1987), Lanser's billings for over $12,050 of attorney's fees "incurred as a result of Riddle's conduct during discovery" is, on its face, unreasonable. [R.03866].

Lanser argued that he incurred $3,612 directly related to his Motion to Compel and that the amount was reasonable. [R.00867, 01047]. A review of the related billings, however, clearly demonstrates unreasonable and duplicative work. Timekeeper JJA billed approximately $350 for research and an additional $385 for his work drafting the Motion to Compel. [R.02677-79]. It should be noted that JJA listed in an October 18, 2015, entry "Finish Motion to Compel Discovery and compilation of supporting documents." [R.02679]. However,

timekeeper SBM then billed $202.50 for her research, $292.50 for her revisions to the Motion to Compel, and then $675 to "finalize" the Motion to Compel. [R.02680]. Lanser also incurred approximately $247.50 in drafting his Reply to the Opposition to Motion to Compel. [R.02686]. The superior court erred in awarding Lanser full fees as sanctions for this work that was clearly subjected to overbilling. It seems highly unlikely and suspect that JJA, an attorney then-employed with Oravec Law Group, would produce a Motion to Compel so deficient that another employee in the practice needed to spend 5.2 hours on additional research, revisions, and "finalization."

Lanser also filed a motion to for expedited consideration of his Motion to Compel. [R.00231-34]. That motion was denied on October 29, 2012, but Lanser nevertheless requested $607.50 in attorney's fees to be assessed against Robert in sanctions for work related to that motion. [R.02680-81]. The motion was clearly not necessary, especially considering that Lanser had already brought a Rule 56(f) continuance motion that, apparently, did not warrant expedited consideration. [R.00275]. Robert should not be forced to bear a sanction for the totality of these unnecessary fees.

Lanser also argued that Robert should be forced to shoulder $1,593 in attorney's fees and $411.23 for the records depositions he conducted while his Motion to Compel was pending.

[R.0867-68]. The superior court abused its discretion in granting Lanser's full Rule 37(g) request. These fees and costs were unreasonable under the circumstances. It should first be noted that Lanser conducted these depositions without providing notice to Robert. [R.02804, 03830]. Furthermore, it is clear that Lanser made a strategic decision to not wait for the Court's order on the Motion to Compel, but chose instead to attempt to gain information from third parties through depositions. Although Lanser was certainly allowed to utilize the tools set forth by the Alaska Civil Rules, it was an abuse of discretion to award sanctions for both Lanser's pursuit of a motion to compel *and* records depositions. Clearly, it was not necessary for Lanser to obtain the information from Robert as well as the various businesses entities he placed under subpoena. Much of this information was not even requested by Lanser in his requests for production. The first set of discovery requests did not seek records, interrogatory answers, or admissions regarding which other companies, aside from FP&T and Bigfoot Pumping and Thawing, transferred septage to Robert's farm, nor how much septage was transferred, nor the charges for such transfers. [R.0689-718]. As such, it cannot be said that these fees and were incurred as a result of Robert's conduct during discovery. Assuming *arguendo* that it was reasonable to award sanctions, the superior court should have awarded Lanser

his fees and costs for either the Motion to Compel *or* the records depositions, but not both. This position is supported by the superior court's own ruling quashing Lanser's subpoena of Bigfoot Pumping & Thawing. [R.0566]. *See, infra*. The superior court quashed the subpoena, but indicated that it could reissue "if appropriate *after* the court rules on the pending motion to compel." [R.0566]. The superior court recognized that the subpoena would likely be unnecessary depending upon its ruling regarding the motion to compel. By allowing both sanctions, the superior court essentially punished Robert for Lanser's unnecessary, duplicative work, much of which did not even form the basis of the Motion to Compel. As such, it was an abuse of discretion to award sanctions for Lanser's records depositions.

Lanser was also awarded $1,822.50 for "pleading practice over quashing Bigfoot Pumping & Thawing Subpoena." [R.00868, 03865-66]. This pleading practice was only "necessary" because Lanser was conducting records depositions, as explained *supra*, without providing proper notice to Robert. The superior court granted the Motion to Quash. [R.0566]. These fees were incurred, not by Robert's actions during discovery but, rather, by Lanser's own ongoing attempts to harass Robert and undermine the discovery process. [R.0603-626]. The superior court recognized the duplicative nature of these requests in its Order quashing the subpoena. [R.0566]. As such, it was an abuse of discretion

to award Lanser sanctions for this unnecessary pleading practice that he brought upon himself by his own actions during discovery.

Lanser further requested—and was awarded—sanctions for his Civil Rule 56(f) motion. [R.0866]. Lanser argued that he incurred $3,465 for 15.4 hours of attorney time spent on the motion. *Id.* The Civil Rule 56(f) motion was only nine pages long. [R.0275-83]. Much of the supporting memorandum was dedicated to reciting allegations of Robert's alleged discovery misconduct. [*Id.*]. A review of the motion demonstrates that, on its face, $3,465 in fees is unreasonable. A more careful comparison of the Civil Rule 56(f) Motion and the Motion to Compel demonstrates that Lanser simply reiterated many of the same assertions in each Motion. [R.0275-83, 0677-86]. As such, it is patently unreasonable to award Lanser $7,077 in attorney's fees on both motions for what was, essentially, duplicated work.

Lanser should have been awarded at most $1,825.00, which was the amount billed for actual time spent on the Motion to Compel. Any fees beyond that amount—especially $12,050—are unreasonable. As such, it was an abuse of discretion to award these unnecessary fees as sanctions.

Lanser was also awarded $2,953.53 for the costs that he claims were incurred as a direct result of Robert's objections to Lanser's discovery requests. [R.3866-67; R.868-70]. Lanser

requested half the cost of his expert report be charged to Robert as a sanction because Lanser did not know "what the cost of supplementing this expert report" would be. [R.870]. Lanser's then-counsel, Ms. Mathis, affied that "Plaintiff will have to get this report, which cost Plaintiff $5,907.06, updated once Defendant's discovery responses are received." [R.875]. In February, 2013, Restoration Science & Engineering billed Lanser $12,629.22 on Invoice 3494 for work "including site visit investigation, survey of septage lagoons, sampling of septage lagoons and water from monitoring well, and laboratory costs for analysis of samples." [R.2704]. Although it is clear that Lanser's experts dedicated a substantial amount of time to visiting Robert's property, taking samples and surveys, and analyzing samples, there is absolutely no indication with respect to what additional cost, if any, Lanser actually suffered with respect to "updating" the expert report. [*See* R.2628-49]. Instead, he merely asserted that $2,953.53 was "directly incurred as a result of Riddle's discovery conduct." [R.2629]. Robert was sanctioned $2,953.53 in costs for Lanser's expert report based on an unsupported claim that Lanser incurred additional fees as a direct result of Robert's objections to discovery requests.

Furthermore, it should be noted that Lanser's experts from Restoration Science & Engineering never testified in this case

despite both a lengthy injunction hearing and trial. Nor was either expert deposed. Still, Robert was ordered to bear part of the costs for Lanser's consulting expert. This sanction based on an unfounded assertion is certainly unjust and an abuse of discretion.

(c) Costs.

Pursuant to the July 20, 2015, Clerk's Ruling on Cost Bill, Lanser was awarded $2,267.42 of the $4,146.17 that he requested in costs [Exc.000233]. Robert argued that Lanser should be awarded no more than $1,913.45 for his costs. [R.003857]. Robert based his appeal of costs on the superior court's order that appeared to grant Lanser $4,146.17 in costs. [R.003867-68]. However, considering the length of this brief and the fact that Lanser was ultimately awarded only $353.97 more than Robert argued was reasonable, Robert is respectfully abandoning his appeal with respect to the costs award.

IV. CONCLUSION

The factual record amply supports that Robert began farming his Eielson Farm Road property beginning in 2005, which then included storing septage in lagoons to be used to amend the soil to his farmland, and that the farm had been in existence since 1986 and under an approved Farm Plan. The facts also support that Lanser first purchased his property in 2007 with specific plans to rezone, subdivide, and build a residential

neighborhood. In 2010, when Lanser was constructing one of the residences in the subdivision, he first detected the odor of Robert's farming operations, i.e. the septage lagoons.

By law, Robert's agricultural facility and/or Robert's agricultural operations are not and cannot become a private nuisance. AS 09.45.235. Lanser's private nuisance case should have been dismissed *ab initio*.

Moreover, notwithstanding that the Right to Farm Law precludes a private nuisance suit against Robert, the court never conducted a proper balancing of interests for finding a private nuisance, which it should have undertaken. As such, the factual record is sufficient for this court to conduct a balancing and to find that Lanser's private nuisance claim fails.

Robert has suffered years of unjust litigation and has unnecessarily born the cost of court-ordered odor abatement. The fees and costs assessed against Robert were altogether unreasonable and the enhancement was patently unjustified.

Accordingly, the Court should find that AS 09.45.235 precludes Lanser's private nuisance suit. The Court should reverse the finding that Robert's farm is a private nuisance. The Court should vacate the order granting injunctive relief. The Court should instruct the trial court that Robert is the prevailing party and should remand for an award of fees and

costs consistent with its opinion.

DATED this 5th day of August, 2015.

THE LAW OFFICES OF WILLIAM R. SATTERBERG, JR.

By: _____
William R. Satterberg, Jr.
Alaska Bar No. 7610126
Attorney for Appellants

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